BULKY SUB

CASE# 04-2-36048-0

SEGMENT 2 **OF** 3

Adkins and approving a minimum-wage law on the principle that "regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process"). As the parentheticals here suggest, while the cases in the *Lochner* line routinely invoked a correct standard of constitutional arbitrariness review, they harbored the spirit of *Dred Scott* in their absolutist implementation of the standard they espoused.

Even before the deviant economic due process cases had been repudiated, however, the more durable precursors of modern substantive due process were reaffirming this Court's obligation to conduct arbitrariness review, beginning with ****2280** *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). Without referring to any specific guarantee of the Bill of Rights, the Court invoked precedents from the *Slaughter-House Cases* through *Adkins* to declare that the Fourteenth Amendment protected "the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." 262 U.S., at 399, 43 S.Ct., at 626. The Court then held that the same Fourteenth Amendment liberty included a teacher's right to teach and the rights of parents to direct their children's education without unreasonable interference by the States, *id.,* at 400, 43 S.Ct., at 627, with the result that Nebraska's prohibition on the teaching of foreign languages in the lower grades was "arbitrary and without reasonable relation to any end within the competency of the State," *id.,* at 403, 43 S.Ct., at 628. See also *Pierce v. Society of Sisters,* 268 U.S. 510, 534- 536, 45 S.Ct. 571, 573-574, 69 L.Ed. 1070 (1925) ***762** finding that a statute that all but outlawed private schools lacked any "reasonable relation to some purpose within the competency of the State"); *Palko v. Connecticut,* 302 U.S. 319, 327-328, 58 S.Ct. 149, 152-153, 82 L.Ed. 288 (1937) ("[E]ven in the field of substantive rights and duties the legislative judgment, if oppressive and arbitrary, may be overridden by the courts." "Is that [injury] to which the statute has subjected [the appellant] a hardship so acute and shocking that our polity will not endure it? Does it violate those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?" (citation and internal quotation marks omitted)).

After *Meyer* and *Pierce,* two further opinions took the major steps that lead to the modern law. The first was not even in a due process case but one about equal protection, *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942), where the Court emphasized the "fundamental" nature of individual choice about procreation and so foreshadowed not only the later prominence of procreation as a subject of liberty protection, but the corresponding standard of "strict scrutiny," in this Court's Fourteenth Amendment law. See *id.,* at 541, 62 S.Ct., at 1113. *Skinner,* that is, added decisions regarding procreation to the list of liberties recognized in *Meyer* and *Pierce* and loosely suggested, as a gloss on their standard of arbitrariness, a judicial obligation to scrutinize any impingement on such an important interest with heightened care. In so doing, it suggested a point that Justice Harlan would develop, that the kind and degree of justification that a sensitive judge would demand of a State would depend on the importance of the interest being asserted by the individual. *Poe,* 367 U.S., at 543, 81 S.Ct., at 1776-1777.

The second major opinion leading to the modern doctrine was Justice Harlan's *Poe* dissent just cited, the conclusion of which was adopted in *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), and the authority of which was acknowledged in *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). See also n. 4, *supra.* The dissent is important ***763** for three things that point to our responsibilities today. The first is Justice Harlan's respect for the tradition of substantive due process review itself, and his acknowledgment of the Judiciary's obligation to carry it on. For two centuries American courts, and for much of that time this Court, have thought it necessary to provide some degree of review over the substantive content of legislation under constitutional standards of textual breadth. The obligation was understood before *Dred Scott* and has continued after the repudiation of *Lochner* 's

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progeny, most notably on the subjects of segregation in public education, *Bolling v. Sharpe,* 347 U.S. 497, 500, 74 S.Ct. 693, 694-695, 98 L.Ed. 884 (1954), interracial marriage, *Loving v. Virginia,* 388 U.S. 1, 12, 87 S.Ct. 1817, 1823-1824, 18 L.Ed.2d 1010 (1967), marital privacy and contraception, *Carey v. Population Services Int'l,* 431 U.S. 678, 684-691, 97 S.Ct. 2010, 2015-2019, 52 L.Ed.2d 675 (1977); *Griswold v. Connecticut, supra,* at 481-486, 85 S.Ct., at 1679-1683, abortion, ****2281***Planned Parenthood of Southeastern Pa. v. Casey, supra,* at 849, 869-879, 112 S.Ct., at 2805-2806, 2816-2822 (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.); *Roe v. Wade,* 410 U.S. 113, 152-166, 93 S.Ct. 705, 726-733, 35 L.Ed.2d 147 (1973), personal control of medical treatment, *Cruzan v. Director, Mo. Dept. of Health,* 497 U.S. 261, 287-289, 110 S.Ct. 2841, 2856-2857, 111 L.Ed.2d 224 (1990) (O'CONNOR, J., concurring); *id.,* at 302, 110 S.Ct., at 2863-2864 (Brennan, J., dissenting); *id.,* at 331, 110 S.Ct., at 2879 (STEVENS, J., dissenting); see also *id.,* at 278, 110 S.Ct., at 2851 (majority opinion), and physical confinement, *Foucha v. Louisiana,* 504 U.S. 71, 80-83, 112 S.Ct. 1780, 1785-1787, 118 L.Ed.2d 437 (1992). This enduring tradition of American constitutional practice is, in Justice Harlan's view, nothing more than what is required by the judicial authority and obligation to construe constitutional text and review legislation for conformity to that text. See *Marbury v. Madison,* 1 Cranch 137, 2 L.Ed. 60 (1803). Like many judges who preceded him and many who followed, he found it impossible to construe the text of due process without recognizing substantive, and not merely procedural, limitations. "Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application ***764** to individuals, nevertheless destroy the enjoyment of all three." *Poe, supra,* at 541, 81 S.Ct., at 1775. [FN7] The text of the Due Process Clause thus imposes nothing less than an obligation to give substantive content to the words "liberty" and "due process of law."

> FN7. Judge Johnson of the New York Court of Appeals had made the point more obliquely a century earlier when he wrote that "the form of this declaration of right, 'no person shall be deprived of life, liberty or property, without due process of law,' necessarily imports that the legislature cannot make the mere existence of the rights secured the occasion of depriving a person of any of them, even by the forms which belong to 'due process of law.' For if it does not necessarily import this, then the legislative power is absolute." And, "[t]o provide for a trial to ascertain whether a man is in the enjoyment of [any] of these rights, and then, as a consequence of finding that he is in the enjoyment of it, to deprive him of it, is doing indirectly just what is forbidden to be done directly, and reduces the constitutional provision to a nullity." *Wynehamer v. People,* 13 N.Y. 378, 420 (1856).

Following the first point of the *Poe* dissent, on the necessity to engage in the sort of examination we conduct today, the dissent's second and third implicitly address those cases, already noted, that are now condemned with virtual unanimity as disastrous mistakes of substantive due process review. The second of the dissent's lessons is a reminder that the business of such review is not the identification of extratextual absolutes but scrutiny of a legislative resolution (perhaps unconscious) of clashing principles, each quite possibly worthy in and of itself, but each to be weighed within the history of our values as a people. It is a comparison of the relative strengths of opposing claims that informs the judicial task, not a deduction from some first premise. Thus informed, judicial review still has no warrant to substitute one reasonable resolution of the contending positions for another, but authority to supplant the balance already struck between the contenders only when it falls outside the realm of the reasonable. Part III, below, deals with this second point, and also with the dissent's third, which takes the form of an ***765** object lesson in the explicit attention to detail that is no less essential to the intellectual discipline of substantive due process review than an understanding of the basic need to account for the two sides in the controversy and to respect legislation within the zone of reasonableness.

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III

My understanding of unenumerated rights in the wake of the *Poe* dissent and subsequent cases avoids the absolutist failing of many older cases without embracing the opposite pole of equating reasonableness with past practice described at a very specific level. See *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S., at 847-849, 112 S.Ct., at 2804-2806. That understanding begins with a concept of "ordered liberty," ****2282** *Poe,* 367 U.S., at 549, 81 S.Ct., at 1780 (Harlan, J.) ; see also *Griswold,* 381 U.S., at 500, 85 S.Ct., at 1690, comprising a continuum of rights to be free from "arbitrary impositions and purposeless restraints," *Poe,* 367 U.S., at 543, 81 S.Ct., at 1777 (Harlan, J., dissenting).

> "Due Process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could ***766** serve as a substitute, in this area, for judgment and restraint." *Id.,* at 542, 81 S.Ct., at 1776.

See also *Moore v. East Cleveland,* 431 U.S. 494, 503, 97 S.Ct. 1932, 1937-1938, 52 L.Ed.2d 531 (1977) (plurality opinion of Powell, J.) ("Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history [and] solid recognition of the basic values that underlie our society' ") (quoting *supra,* 381 U.S., at 501, 85 S.Ct., at 1691 (Harlan, J., concurring)).

After the *Poe* dissent, as before it, this enforceable concept of liberty would bar statutory impositions even at relatively trivial levels when governmental restraints are undeniably irrational as unsupported by any imaginable rationale. See, *e.g., United States v. Carolene Products Co.,* 304 U.S. 144, 152, 58 S.Ct. 778, 783, 82 L.Ed. 1234 (1938) (economic legislation "not ... unconstitutional unless ... facts ... preclude the assumption that it rests upon some rational basis"); see also *Poe, supra,* at 545, 548, 81 S.Ct., at 1778, 1779-1780 (Harlan, J., dissenting) (referring to usual "presumption of constitutionality" and ordinary test "going merely to the plausibility of [a statute's] underlying rationale"). Such instances are suitably rare. The claims of arbitrariness that mark almost all instances of unenumerated substantive rights are those resting on "certain interests requir [ing] particularly careful scrutiny of the state needs asserted to justify their abridgment[,] [c]f. *Skinner v. Oklahoma* [*ex rel. Williamson,* 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942)]; *Bolling v. Sharpe,* [347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954)]," *id.,* at 543, 81 S.Ct., at 1777; that is, interests in liberty sufficiently important to be judged "fundamental," *id.,* at 548, 81 S.Ct., at 1779-1780; see also *id.,* at 541, 81 S.Ct., at 1775-1776 (citing *Corfield v. Coryell,* 4 Wash. C.C. 371, 380 (C.C.E.D.Pa.1823)). In the face of an interest this powerful a State may not rest on threshold rationality or a presumption of constitutionality, but may prevail only on the ground of an interest sufficiently compelling to place within the realm of the reasonable a refusal to recognize the individual right asserted. *Poe, supra,* at 548, 81 S.Ct., at 1779-1780 (Harlan, J., dissenting) (an "enactment involv[ing] ... a most fundamental aspectof '***767** liberty' ... [is] subjec[t] to 'strict scrutiny' ") (quoting *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S., at 541, 62 S.Ct., at 1113); [FN8] *Reno v. Flores,* 507 U.S. 292, 301-302, 113 S.Ct. 1439, 1446-1447, 123 L.Ed.2d 1 (1993) (****2283** reaffirming that due process "forbids the government to infringe certain 'fundamental' liberty interests ... unless the infringement is narrowly tailored to serve a compelling state interest"). [FN9]

> FN8. We have made it plain, of course, that not every law that incidentally makes

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it somewhat harder to exercise a fundamental liberty must be justified by a compelling counterinterest. See *Casey,* 505 U.S., at 872-876, 112 S.Ct., at 2817-2820 (joint opinion of O'CONNOR, KENNEDY , and SOUTER, JJ.); *Carey v. Population Services Int'l,* 431 U.S. 678, 685-686, 97 S.Ct. 2010, 2016, 52 L.Ed.2d 675 (1977) ("[A]n individual's [constitutionally protected] liberty to make choices regarding contraception does not ... automatically invalidate every state regulation in this area. The business of manufacturing and selling contraceptives may be regulated in ways that do not [even] infringe protected individual choices"). But a state law that creates a "substantial obstacle," *Casey, supra,* at 877, 112 S.Ct., at 2820, for the exercise of a fundamental liberty interest requires a commensurably substantial justification in order to place the legislation within the realm of the reasonable.

FN9. Justice Harlan thus recognized just what the Court today assumes, that by insisting on a threshold requirement that the interest (or, as the Court puts it, the right) be fundamental before anything more than rational basis justification is required, the Court ensures that not every case will require the "complex balancing" that heightened scrutiny entails. See *ante,* at 2283-2284.

This approach calls for a court to assess the relative "weights" or dignities of the contending interests, and to this extent the judicial method is familiar to the common law. Common-law method is subject, however, to two important constraints in the hands of a court engaged in substantive due process review. First, such a court is bound to confine the values that it recognizes to those truly deserving constitutional stature, either to those expressed in constitutional text, or those exemplified by "the traditions from which [the Nation] developed," or revealed by contrast with "the traditions from which it broke." *Poe,* 367 U.S., at 542, 81 S.Ct., at 1776 (Harlan, J., dissenting). " 'We may not draw on our merely personal and private notions and disregard the limits ... derived from ***768** considerations that are fused in the whole nature of our judicial process ... [,] considerations deeply rooted in reason and in the compelling traditions of the legal profession.' " *Id.,* at 544-545, 81 S.Ct., at 1778 (quoting *Rochin v. California,* 342 U.S. 165, 170-171, 72 S.Ct. 205, 208-209, 96 L.Ed. 183 (1952)); see also *Palko v. Connecticut,* 302 U.S., at 325, 58 S.Ct., at 152 (looking to " 'principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental' ") (quoting *Snyder v. Massachusetts,* 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934)).

The second constraint, again, simply reflects the fact that constitutional review, not judicial lawmaking, is a court's business here. The weighing or valuing of contending interests in this sphere is only the first step, forming the basis for determining whether the statute in question falls inside or outside the zone of what is reasonable in the way it resolves the conflict between the interests of state and individual. See, *e.g., Poe, supra,* at 553, 81 S.Ct., at 1782 (Harlan, J., dissenting); *Youngberg v. Romeo,* 457 U.S. 307, 320-321, 102 S.Ct. 2452, 2460-2461, 73 L.Ed.2d 28 (1982). It is no justification for judicial intervention merely to identify a reasonable resolution of contending values that differs from the terms of the legislation under review. It is only when the legislation's justifying principle, critically valued, is so far from being commensurate with the individual interest as to be arbitrarily or pointlessly applied that the statute must give way. Only if this standard points against the statute can the individual claimant be said to have a constitutional right. See *Cruzan v. Director, Mo. Dept. of Health,* 497 U.S., at 279, 110 S.Ct., at 2851-2852 ("[D]etermining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry; 'whether [the individual's] constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests' ") (quoting *Youngberg v. Romeo, supra,* at 321, 102 S.Ct., at 2461). [FN10]

FN10. Our cases have used various terms to refer to fundamental liberty interests, see, *e.g., Poe,* 367 U.S., at 545, 81 S.Ct.,

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> at 1778 (Harlan, J., dissenting) (" 'basic liberty' ") (quoting *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942)); *Poe, supra,* at 543, 81 S.Ct., at 1776-1777 (Harlan, J., dissenting) ("certain interests" must bring "particularly careful scrutiny"); *Casey,* 505 U.S., at 848, 112 S.Ct., at 2805 ("protected liberty"); *Cruzan v. Director, Mo. Dept. of Health,* 497 U.S. 261, 278, 110 S.Ct. 2841, 2851, 111 L.Ed.2d 224 (1990) ("constitutionally protected liberty interest"); *Youngberg v. Romeo,* 457 U.S., at 315, 102 S.Ct., at 2457 ("liberty interests"), and at times we have also called such an interest a "right" even before balancing it against the government's interest, see, *e.g., Roe v. Wade,* 410 U.S. 113, 153-154, 93 S.Ct. 705, 726-727, 35 L.Ed.2d 147 (1973); *Carey v. Population Services Int'l, supra,* at 686, 688, and n. 5, 97 S.Ct., at 2016, 2017, and n. 5; *Poe, supra,* at 541, 81 S.Ct., at 1775 ("rights 'which are ... *fundamental* ' ") (quoting *Corfield v. Coryell,* 4 Wash. C.C. 371, 380 (C.C.E.D.Pa.1825)). Precision in terminology, however, favors reserving the label "right" for instances in which the individual's liberty interest actually trumps the government's countervailing interests; only then does the individual have anything legally enforceable as against the state's attempt at regulation.

****2284 *769** The *Poe* dissent thus reminds us of the nature of review for reasonableness or arbitrariness and the limitations entailed by it. But the opinion cautions against the repetition of past error in another way as well, more by its example than by any particular statement of constitutional method: it reminds us that the process of substantive review by reasoned judgment, *Poe,* 367 U.S., at 542-544, 81 S.Ct., at 1776-1778, is one of close criticism going to the details of the opposing interests and to their relationships with the historically recognized principles that lend them weight or value.

Although the *Poe* dissent disclaims the possibility of any general formula for due process analysis (beyond the basic analytic structure just described), see *id.,* at 542, 544, 81 S.Ct., at 1776, 1777-1778, Justice Harlan of course assumed that adjudication under the Due Process Clauses is like any other instance of judgment dependent on common-law method, being more or less persuasive according to the usual canons of critical discourse. See also *Casey,* 505 U.S., at 849, 112 S.Ct., at 2805-2806 ("The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment"). When identifying and assessing the competing interests of liberty and authority, for example, ***770** the breadth of expression that a litigant or a judge selects in stating the competing principles will have much to do with the outcome and may be dispositive. As in any process of rational argumentation, we recognize that when a generally accepted principle is challenged, the broader the attack the less likely it is to succeed. The principle's defenders will, indeed, often try to characterize any challenge as just such a broadside, perhaps by couching the defense as if a broadside attack had occurred. So the Court in *Dred Scott* treated prohibition of slavery in the Territories as nothing less than a general assault on the concept of property. See 19 How., at 449- 452.

Just as results in substantive due process cases are tied to the selections of statements of the competing interests, the acceptability of the results is a function of the good reasons for the selections made. It is here that the value of common-law method becomes apparent, for the usual thinking of the common law is suspicious of the all-or-nothing analysis that tends to produce legal petrification instead of an evolving boundary between the domains of old principles. Common-law method tends to pay respect instead to detail, seeking to understand old principles afresh by new examples and new counterexamples. The "tradition is a living thing," *Poe,* 367 U.S., at 542, 81 S.Ct., at 1776 (Harlan, J., dissenting), albeit one that moves by moderate steps carefully taken. "The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision must take its place in relation to what went before and further [cut] a

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channel for what is to come." *Id.*, at 544, 81 S.Ct., at 1777 (Harlan, J., dissenting) (internal quotation marks omitted). Exact analysis and characterization of any due process claim are critical to the method and to the result.

So, in *Poe*, Justice Harlan viewed it as essential to the plaintiffs' claimed right to use contraceptives that they sought to do so within the privacy of the marital bedroom. This detail in fact served two crucial and complementary ***771** functions, and provides a lesson for today. It rescued the individuals' claim from a breadth that would have threatened all state regulation of contraception or intimate relations; extramarital intimacy, no matter how privately practiced, was outside the scope of the right Justice Harlan would have recognized in that case. See *id.*, at 552-553, 81 S.Ct., at 1781-1782. It was, moreover, this same restriction that allowed the interest to be valued as an aspect of a broader liberty to be free from all unreasonable intrusions into the privacy of the home and the family life within it, a liberty exemplified in constitutional provisions such as the Third and Fourth Amendments, in prior decisions of the Court involving unreasonable ****2285** intrusions into the home and family life, and in the then-prevailing status of marriage as the sole lawful locus of intimate relations. *Id.*, at 548, 551, 81 S.Ct., at 1779-1780, 1781. [FN11] The individuals' interest was therefore at its peak in *Poe*, because it was supported by a principle that distinguished of its own force between areas in which government traditionally had regulated (sexual relations outside of marriage) and those in which it had not (private marital intimacies), and thus was broad enough to cover the claim at hand without being so broad as to be shot-through by exceptions.

> FN11. Thus, as the *Poe* dissent illustrates, the task of determining whether the concrete right claimed by an individual in a particular case falls within the ambit of a more generalized protected liberty requires explicit analysis when what the individual wants to do could arguably be characterized as belonging to different strands of our legal tradition requiring different degrees of constitutional scrutiny. See also Tribe & Dorf, Levels of Generality in the Definition of Rights, 57 U. Chi. L.Rev. 1057, 1091 (1990) (abortion might conceivably be assimilated either to the tradition regarding women's reproductive freedom in general, which places a substantial burden of justification on the State, or to the tradition regarding protection of fetuses, as embodied in laws criminalizing feticide by someone other than the mother, which generally requires only rationality on the part of the State). Selecting among such competing characterizations demands reasoned judgment about which broader principle, as exemplified in the concrete privileges and prohibitions embodied in our legal tradition, best fits the particular claim asserted in a particular case.

***772** On the other side of the balance, the State's interest in *Poe* was not fairly characterized simply as preserving sexual morality, or doing so by regulating contraceptive devices. Just as some of the earlier cases went astray by speaking without nuance of individual interests in property or autonomy to contract for labor, so the State's asserted interest in *Poe* was not immune to distinctions turning (at least potentially) on the precise purpose being pursued and the collateral consequences of the means chosen, see *id.*, at 547-548, 81 S.Ct., at 1779-1780. It was assumed that the State might legitimately enforce limits on the use of contraceptives through laws regulating divorce and annulment, or even through its tax policy, *ibid.*, but not necessarily be justified in criminalizing the same practice in the marital bedroom, which would entail the consequence of authorizing state enquiry into the intimate relations of a married couple who chose to close their door, *id.*, at 548-549, 81 S.Ct., at 1779-1780. See also *Casey*, 505 U.S., at 869, 112 S.Ct., at 2816 (strength of State's interest in potential life varies depending on precise context and character of regulation pursuing that interest).

The same insistence on exactitude lies behind questions, in current terminology, about the proper level of generality at which to analyze claims and counterclaims, and the demand for fitness and proper tailoring of a restrictive statute is just

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another way of testing the legitimacy of the generality at which the government sets up its justification. [FN12] We may ***773** therefore classify Justice Harlan's example of proper analysis in any of these ways: as applying concepts of normal critical reasoning, as pointing to the need to attend to the levels of generality at which countervailing interests are stated, or as examining the concrete application of principles for fitness with their own ostensible justifications. But whatever the categories in which we place the dissent's example, it stands in marked contrast to earlier cases whose reasoning was marked by comparatively less discrimination, and it points to the importance of evaluating the claims of the parties now before us with comparable detail. For ****2286** here we are faced with an individual claim not to a right on the part of just anyone to help anyone else commit suicide under any circumstances, but to the right of a narrow class to help others also in a narrow class under a set of limited circumstances. And the claimants are met with the State's assertion, among others, that rights of such narrow scope cannot be recognized without jeopardy to individuals whom the State may concededly protect through its regulations.

> FN12. The dual dimensions of the strength and the fitness of the government's interest are succinctly captured in the so-called "compelling interest test," under which regulations that substantially burden a constitutionally protected (or "fundamental") liberty may be sustained only if "narrowly tailored to serve a compelling state interest," *Reno v. Flores*, 507 U.S. 292, 302, 113 S.Ct. 1439, 1447, 123 L.Ed.2d 1 (1993); see also, *e.g.*, *Roe v. Wade*, 410 U.S., at 155, 93 S.Ct., at 727; *Carey v. Population Services Int'l*, 431 U.S., at 686, 97 S.Ct., at 2016. How compelling the interest and how narrow the tailoring must be will depend, of course, not only on the substantiality of the individual's own liberty interest, but also on the extent of the burden placed upon it, see *Casey*, 505 U.S., at 871-874, 112 S.Ct., at 2817-2819 (opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.); *Carey, supra*, at 686, 97 S.Ct., at 2016.

IV
A

Respondents claim that a patient facing imminent death, who anticipates physical suffering and indignity, and is capable of responsible and voluntary choice, should have a right to a physician's assistance in providing counsel and drugs to be administered by the patient to end life promptly. Complaint ¶ 3.1. They accordingly claim that a physician must have the corresponding right to provide such aid, contrary to the provisions of Wash. Rev.Code § 9A.36.060 (1994). I do not understand the argument to rest on any assumption that rights either to suicide or to assistance in committing it are historically based as such. Respondents, rather, acknowledge the prohibition of each historically, but rely on the fact that to a substantial extent the State has repudiated that history. The result of this, respondents say, is to open ***774** the door to claims of such a patient to be accorded one of the options open to those with different, traditionally cognizable claims to autonomy in deciding how their bodies and minds should be treated. They seek the option to obtain the services of a physician to give them the benefit of advice and medical help, which is said to enjoy a tradition so strong and so devoid of specifically countervailing state concern that denial of a physician's help in these circumstances is arbitrary when physicians are generally free to advise and aid those who exercise other rights to bodily autonomy.

1

The dominant western legal codes long condemned suicide and treated either its attempt or successful accomplishment as a crime, the one subjecting the individual to penalties, the other penalizing his survivors by designating the suicide's property as forfeited to the government. See 4 W. Blackstone, Commentaries *188-*189 (commenting that English law considered suicide to be "ranked ... among the highest crimes" and deemed persuading another to commit suicide to be murder); see generally Marzen, O'Dowd, Crone, & Balch, Suicide: A Constitutional Right?, 24 Duquesne L.Rev. 1, 56-63 (1985). While suicide itself has generally not been

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considered a punishable crime in the United States, largely because the common-law punishment of forfeiture was rejected as improperly penalizing an innocent family, see *id.*, at 98-99, most States have consistently punished the act of assisting a suicide as either a common-law or statutory crime and some continue to view suicide as an unpunishable crime. See generally *id.*, at 67-100, 148-242. [FN13] Criminal prohibitions *775 on such assistance **2287 remain widespread, as exemplified in the Washington statute in question here. [FN14]

FN13. Washington and New York are among the minority of States to have criminalized attempted suicide, though neither State still does so. See Brief for Members of the New York and Washington State Legislatures as *Amicus Curiae* 15, n. 8 (listing state statutes).

The common law governed New York as a Colony and the New York Constitution of 1777 recognized the common law, N.Y. Const. of 1777, Art. XXXV, and the state legislature recognized common-law crimes by statute in 1788. See Act of Feb. 21, 1788, ch. 37, § 2, 1788 N.Y. Laws 664 (codified at 2 N.Y. Laws 73 (Greenleaf 1792)). In 1828, New York changed the common-law offense of assisting suicide from murder to manslaughter in the first degree. See 2 N.Y.Rev.Stat. pt. 4, ch. 1, tit. 2, art. 1, § 7, p. 661 (1829). In 1881, New York adopted a new penal code making attempted suicide a crime punishable by two years in prison, a fine, or both, and retaining the criminal prohibition against assisting suicide as manslaughter in the first degree. Act of July 26, 1881, ch. 676, §§ 172-178, 1881 N.Y. Laws (3 Penal Code), pp. 42-43 (codified at 4 N.Y. Consolidated Laws, Penal Law §§ 2300-2306, pp. 2809-2810 (1909)). In 1919, New York repealed the statutory provision making attempted suicide a crime. See Act of May 5, 1919, ch. 414, § 1, 1919 N.Y. Laws 1193. The 1937 New York Report of the Law Revision Commission found that the history of the ban on assisting suicide was "traceable into the ancient common law when a suicide or *felo de se* was guilty of crime punishable by forfeiture of his goods and chattels." State of New York, report of the Law Revision Commission for 1937, p. 830. The report stated that since New York had removed "all stigma [of suicide] as a crime" and that "[s]ince liability as an accessory could no longer hinge upon the crime of a principal, it was necessary to define it as a substantive offense." *Id.*, at 831. In 1965, New York revised its penal law, providing that a "person is guilty of manslaughter in the second degree when ... he intentionally causes or aids another person to commit suicide." Penal Law, ch. 1030, 1965 N.Y. Laws 2387 (codified at N.Y. Penal Law § 125.15(3) (McKinney 1975)).

Washington's first territorial legislature designated assisting another "in the commission of self-murder" to be manslaughter, see Act of Apr. 28, 1854, § 17, 1854 Wash. Laws 78, and re-enacted the provision in 1869 and 1873, see Act of Dec. 2, 1869, § 17, 1869 Wash. Laws 201; Act of Nov. 10, 1873, § 19, 1873 Wash. Laws 184 (codified at Wash.Code § 794 (1881)). In 1909, the state legislature enacted a law based on the 1881 New York law and a similar one enacted in Minnesota, see Marzen, O'Dowd, Crone, & Balch, 24 Duquesne L.Rev., at 206, making attempted suicide a crime punishable by two years in prison or a fine, and retaining the criminal prohibition against assisting suicide, designating it manslaughter. See Criminal Code, ch. 249, §§ 133-137, 1909 Wash. Laws, 11th Sess., 890, 929 (codified at Remington & Ballinger's Wash.Code §§ 2385-2389 (1910)). In 1975, the Washington Legislature repealed these provisions, see Wash.Crim. Code, 1975, ch. 260, § 9A.92.010 (213-217), 1975 Wash. Laws 817, 858, 866, and enacted the ban on assisting suicide at issue in this case, see Wash.Crim. Code, 1975, ch. 260, § 9A.36.060, 1975 Wash. Laws 817, 836, codified at Rev. Wash. Code § 9A.36.060 (1977). The decriminalization of

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attempted suicide reflected the view that a person compelled to attempt it should not be punished if the attempt proved unsuccessful. See *Compassion in Dying v. Washington,* 850 F.Supp. 1454, 1464, n. 9 (W.D.Wash.1994) (citing Legislative Council Judiciary Committee, Report on the Revised Washington Criminal Code 153 (Dec. 3, 1970)).

FN14. Numerous States have enacted statutes prohibiting assisting a suicide. See, *e.g.,* Alaska Stat. Ann. § 11.41.120(a)(2) (1996); Ariz.Rev.Stat. Ann. § 13-1103(A)(3) (Supp.1996-1997); Ark.Code Ann. § 5-10-104(a)(2) (1993); Cal.Penal Code Ann. § 401 (West 1988); Colo.Rev.Stat. § 18-3-104(1)(b) (Supp.1996); Conn. Gen.Stat. § 53a-56(a)(2) (1997); Del.Code Ann., Tit. 11, § 645 (1995); Fla. Stat. § 782.08 (1991); Ga.Code Ann. § 16-5-5(b) (1996); Haw.Rev.Stat. § 707-702(1)(b) (1993); Ill. Comp. Stat., ch. 720, § 5/12-31 (1993); Ind. Code §§ 35-42-1-2 to 35-42-1-2.5 (1994 and Supp.1996); Iowa Code Ann. § 707A.2 (West Supp.1997); Kan. Stat. Ann. § 21-3406 (1995); Ky.Rev.Stat. Ann. § 216.302 (Michie 1994); La.Rev.Stat. Ann. § 14:32.12 (West Supp.1997); Me.Rev.Stat. Ann., Tit. 17-A, § 204 (1983); Mich. Comp. Laws Ann. § 752.1027 (West Supp.1997-1998); Minn.Stat. § 609.215 (1996); Miss.Code Ann. § 97-3-49 (1994); Mo. Rev. Stat. § 565.023.1(2) (1994); Mont.Code Ann. § 45-5-105 (1995); Neb.Rev.Stat., § 28-307 (1995); N.H.Rev.Stat. Ann. § 630:4 (1996) ; N.J. Stat. Ann. § 2C:11-6 (West 1995); N.M. Stat. Ann. § 30-2-4 (1996); N.Y. Penal Law § 120.30 (McKinney 1987); N.D. Cent.Code § 12.1-16-04 (Supp.1995) ; Okla. Stat., Tit. 21, §§ 813-815 (1983); Ore.Rev.Stat. § 163.125(1)(b) (1991); Pa. Stat. Ann., Tit. 18, § 2505 (Purdon 1983); R.I. Gen. Laws §§ 11-60-1 through 11-60-5 (Supp.1996); S.D. Codified Laws § 22-16-37 (1988); Tenn.Code Ann. § 39-13-216 (Supp.1996); Tex. Penal Code Ann. § 22.08 (1994); Wash. Rev.Code § 9A.36.060 (1994); Wis. Stat. § 940.12 (1993-1994). See also P.R. Laws Ann., Tit. 33, § 4009 (1984).

The principal significance of this history in the State of Washington, according to respondents, lies in its repudiation ***776** of the old tradition to the extent of eliminating the criminal suicide prohibitions. Respondents do not argue that the State's decision goes further, to imply that the State has repudiated any legitimate claim to discourage suicide or to limit its encouragement. The reasons for the decriminalization, after all, may have had more to do with difficulties of law enforcement than with a shift in the value ascribed to ***777** life in various circumstances or in the perceived legitimacy of taking one's own. See, *e.g.,* Kamisar, Physician-Assisted Suicide: The Last Bridge to Active Voluntary Euthanasia, in Euthanasia Examined 225, 229 (J. Keown ed.1995); CeloCruz, Aid-in-Dying: Should We Decriminalize Physician-Assisted Suicide and Physician-Committed Euthanasia?, 18 Am. J.L. & Med. 369, 375 (1992); Marzen, O'Dowd, Crone, & Balch, 24 Duquesne L.Rev., at 98-99. Thus it may indeed make sense for the State to take its hands off suicide as such, while continuing to prohibit the sort of assistance that would make its commission easier. See, *e.g.,* American Law Institute, Model Penal Code § 210.5, Comment 5 (1980). Decriminalization does not, then, imply the existence of a constitutional liberty interest in suicide as such; it simply opens the door to the assertion of a cognizable liberty interest in bodily integrity and associated medical care that would otherwise have been inapposite so long as suicide, as well as assisting a suicide, was a criminal offense.

****2288** This liberty interest in bodily integrity was phrased in a general way by then-Judge Cardozo when he said, "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body" in relation to his medical needs. *Schloendorff v. Society of New York Hospital,* 211 N.Y. 125, 129, 105 N.E. 92, 93 (1914). The familiar examples of this right derive from the common law of battery and include the right to be free from medical invasions into the body, *Cruzan v. Director, Mo. Dept. of Health,* 497 U.S., at 269-279, 110 S.Ct., at 2846-2852, as well

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as a right generally to resist enforced medication, see *Washington v. Harper,* 494 U.S. 210, 221-222, 229, 110 S.Ct. 1028, 1036-1037, 1040-1041, 108 L.Ed.2d 178 (1990). Thus "[i]t is settled now ... that the Constitution places limits on a State's right to interfere with a person's most basic decisions about ... bodily integrity." *Casey,* 505 U.S., at 849, 112 S.Ct., at 2806 (citations omitted); see also *Cruzan,* 497 U.S., at 278, 110 S.Ct., at 2851; *id.,* at 288, 110 S.Ct., at 2856-2857 (O'CONNOR, J., concurring); *Washington v. Harper, supra,* at 221-222, 110 S.Ct., at 1036-1037; *Winston v. Lee,* 470 U.S. 753, 761-762, 105 S.Ct. 1611, 1617-1618, 84 L.Ed.2d 662 (1985); ***778***Rochin v. California,* 342 U.S., at 172, 72 S.Ct., at 209-210. Constitutional recognition of the right to bodily integrity underlies the assumed right, good against the State, to require physicians to terminate artificial life support, *Cruzan, supra,* at 279, 110 S.Ct., at 2851-2852 ("[W]e assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition"), and the affirmative right to obtain medical intervention to cause abortion, see *Casey, supra,* at 857, 896, 112 S.Ct., at 2810, 2830; cf. *Roe v. Wade,* 410 U.S., at 153, 93 S.Ct., at 726-727.

It is, indeed, in the abortion cases that the most telling recognitions of the importance of bodily integrity and the concomitant tradition of medical assistance have occurred. In *Roe v. Wade,* the plaintiff contended that the Texas statute making it criminal for any person to "procure an abortion," *id.,* at 117, 93 S.Ct., at 709, for a pregnant woman was unconstitutional insofar as it prevented her from "terminat[ing] her pregnancy by an abortion 'performed by a competent, licensed physician, under safe, clinical conditions,' " *id.,* at 120, 93 S.Ct., at 710, and in striking down the statute we stressed the importance of the relationship between patient and physician, see *id.,* at 153, 156, 93 S.Ct., at 726-727, 728.

The analogies between the abortion cases and this one are several. Even though the State has a legitimate interest in discouraging abortion, see *Casey, supra,* at 871, 112 S.Ct., at 2817 (joint opinion of O'CONNOR, K ENNEDY, and SOUTER, JJ.); *Roe,* 410 U.S., at 162, 93 S.Ct., at 731, the Court recognized a woman's right to a physician's counsel and care. Like the decision to commit suicide, the decision to abort potential life can be made irresponsibly and under the influence of others, and yet the Court has held in the abortion cases that physicians are fit assistants. Without physician assistance in abortion, the woman's right would have too often amounted to nothing more than a right to self-mutilation, and without a physician to assist in the suicide of the dying, the patient's right will often be confined to crude methods of causing death, most shocking and painful to the decedent's survivors.

***779** There is, finally, one more reason for claiming that a physician's assistance here would fall within the accepted tradition of medical care in our society, and the abortion cases are only the most obvious illustration of the further point. While the Court has held that the performance of abortion procedures can be restricted to physicians, the Court's opinion in *Roe* recognized the doctors' role in yet another way. For, in the course of holding that the decision to perform an abortion called for a physician's assistance, the Court recognized that the good physician is not just a mechanic of the human body whose services have no bearing on a person's moral choices, but one who does more than treat symptoms, one who ministers to the patient. See *id.,* at 153, 93 S.Ct., at 726-727; see also *Griswold v. Connecticut,* 381 U.S., at 482, 85 S.Ct., at 1680-1681 ("This law ... operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation"); see generally R. ****2289** Cabot, Ether Day Address, Boston Medical and Surgical J. 287, 288 (1920). This idea of the physician as serving the whole person is a source of the high value traditionally placed on the medical relationship. Its value is surely as apparent here as in the abortion cases, for just as the decision about abortion is not directed to correcting some pathology, so the decision in which a dying patient seeks help is not so limited. The patients here sought not only an end to pain (which they might have had, although perhaps at the price of stupor) but an end to their short remaining lives with a dignity that they believed would be denied them by powerful pain medication, as well as by their consciousness of dependency and helplessness as they approached death. In that period when the

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end is imminent, they said, the decision to end life is closest to decisions that are generally accepted as proper instances of exercising autonomy over one's own body, instances recognized under the Constitution and the State's own law, instances in which the help of physicians is accepted as falling within the traditional norm.

***780** Respondents argue that the State has in fact already recognized enough evolving examples of this tradition of patient care to demonstrate the strength of their claim. Washington, like other States, authorizes physicians to withdraw life-sustaining medical treatment and artificially delivered food and water from patients who request it, even though such actions will hasten death. See Wash. Rev.Code §§ 70.122.110, 70.122.051 (1994) ; see generally Notes to Uniform Rights of the Terminally Ill Act, 9B U.L.A. 168- 169 (Supp.1997) (listing state statutes). The State permits physicians to alleviate anxiety and discomfort when withdrawing artificial life-supporting devices by administering medication that will hasten death even further. And it generally permits physicians to administer medication to patients in terminal conditions when the primary intent is to alleviate pain, even when the medication is so powerful as to hasten death and the patient chooses to receive it with that understanding. See Wash. Rev.Code § 70.122.010 (1994); see generally Rousseau, Terminal Sedation in the Care of Dying Patients, 156 Archives of Internal Medicine 1785 (1996); Truog, Berde, Mitchell, & Grier, Barbiturates in the Care of the Terminally Ill, 327 New Eng. J. Med. 1678 (1992). [FN15]

FN15. Other States have enacted similar provisions, some categorically authorizing such pain treatment, see, *e.g.*, Ind.Code § 35- 42-1-2.5(a)(1) (Supp.1996) (ban on assisted suicide does not apply to licensed health-care provider who administers or dispenses medications or procedures to relieve pain or discomfort, even if such medications or procedures hasten death, unless provider intends to cause death); Iowa Code Ann. § 707A.3.1 (West Supp.1997) (same); Ky.Rev.Stat. Ann. § 216.304 (Michie 1997) (same); Minn.Stat. Ann. § 609.215(3) (West Supp.1997) (same); Ohio Rev.Code Ann. §§ 2133.11(A)(6), 2133.12(E)(1) (1994); R.I. Gen. Laws § 11-60-4 (Supp.1996) (same); S.D. Codified Laws § 22-16-37.1 (Supp.1997); see Mich. Comp. Laws Ann. § 752.1027(3) (West Supp.1997); Tenn.Code Ann. § 39-13- 216(b)(2) (1996) ; others permit patients to sign health-care directives in which they authorize pain treatment even if it hastens death. See, *e.g.*, Me.Rev.Stat. Ann., Tit. 18-A, §§ 5-804, 5-809 (1996); N.M. Stat. Ann. §§ 24-7A-4, 24-7A-9 (Supp.1995); S.C.Code Ann. § 62-5-504 (Supp.1996); Va.Code Ann. §§ 54.1-2984, 54.1-2988 (1994).

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The argument supporting respondents' position thus progresses through three steps of increasing forcefulness. First, it emphasizes the decriminalization of suicide. Reliance on this fact is sanctioned under the standard that looks not only to the tradition retained, but to society's occasional choices to reject traditions of the legal past. See *Poe v. Ullman*, 367 U.S., at 542, 81 S.Ct., at 1776 (Harlan, J., dissenting). While the common law prohibited both suicide and aiding a suicide, with the prohibition on aiding largely justified by the primary prohibition on self-inflicted death itself, see, *e.g.*, American Law Institute, Model Penal Code § 210.5, Comment 1, at 92-93, and n. 7, the State's rejection of the traditional treatment of the one leaves the criminality of the other open to questioning that previously would not have been appropriate. The second step in the argument is to emphasize that the State's own act of decriminalization gives a freedom of choice much like the individual's option in recognized instances of bodily autonomy. One of these, abortion, is a legal right to ****2290** choose in spite of the interest a State may legitimately invoke in discouraging the practice, just as suicide is now subject to choice, despite a state interest in discouraging it. The third step is to emphasize that respondents claim a right to assistance not on the basis of some broad principle that would be subject to exceptions if that continuing interest of the State's in discouraging suicide were to be recognized at all. Respondents

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base their claim on the traditional right to medical care and counsel, subject to the limiting conditions of informed, responsible choice when death is imminent, conditions that support a strong analogy to rights of care in other situations in which medical counsel and assistance have been available as a matter of course. There can be no stronger claim to a physician's assistance than at the time when death is imminent, a moral judgment implied by the State's own recognition of the legitimacy of medical procedures necessarily hastening the moment of impending death.

***782** In my judgment, the importance of the individual interest here, as within that class of "certain interests" demanding careful scrutiny of the State's contrary claim, see *Poe, supra,* at 543, 81 S.Ct., at 1776-1777, cannot be gainsaid. Whether that interest might in some circumstances, or at some time, be seen as "fundamental" to the degree entitled to prevail is not, however, a conclusion that I need draw here, for I am satisfied that the State's interests described in the following section are sufficiently serious to defeat the present claim that its law is arbitrary or purposeless.

B

The State has put forward several interests to justify the Washington law as applied to physicians treating terminally ill patients, even those competent to make responsible choices: protecting life generally, Brief for Petitioners 33, discouraging suicide even if knowing and voluntary, *id.,* at 37-38, and protecting terminally ill patients from involuntary suicide and euthanasia, both voluntary and nonvoluntary, *id.,* at 34-35.

It is not necessary to discuss the exact strengths of the first two claims of justification in the present circumstances, for the third is dispositive for me. That third justification is different from the first two, for it addresses specific features of respondents' claim, and it opposes that claim not with a moral judgment contrary to respondents', but with a recognized state interest in the protection of nonresponsible individuals and those who do not stand in relation either to death or to their physicians as do the patients whom respondents describe. The State claims interests in protecting patients from mistakenly and involuntarily deciding to end their lives, and in guarding against both voluntary and involuntary euthanasia. Leaving aside any difficulties in coming to a clear concept of imminent death, mistaken decisions may result from inadequate palliative care or a terminal prognosis that turns out to be error; coercion and abuse may stem from the large medical bills that family members cannot bear ***783** or unreimbursed hospitals decline to shoulder. Voluntary and involuntary euthanasia may result once doctors are authorized to prescribe lethal medication in the first instance, for they might find it pointless to distinguish between patients who administer their own fatal drugs and those who wish not to, and their compassion for those who suffer may obscure the distinction between those who ask for death and those who may be unable to request it. The argument is that a progression would occur, obscuring the line between the ill and the dying, and between the responsible and the unduly influenced, until ultimately doctors and perhaps others would abuse a limited freedom to aid suicides by yielding to the impulse to end another's suffering under conditions going beyond the narrow limits the respondents propose. The State thus argues, essentially, that respondents' claim is not as narrow as it sounds, simply because no recognition of the interest they assert could be limited to vindicating those interests and affecting no others. The State says that the claim, in practical effect, would entail consequences that the State could, without doubt, legitimately act to prevent.

The mere assertion that the terminally sick might be pressured into suicide decisions by close friends and family members would ****2291** not alone be very telling. Of course that is possible, not only because the costs of care might be more than family members could bear but simply because they might naturally wish to see an end of suffering for someone they love. But one of the points of restricting any right of assistance to physicians would be to condition the right on an exercise of judgment by someone qualified to assess the patient's responsible capacity and detect the influence of those outside the medical relationship.

The State, however, goes further, to argue that dependence on the vigilance of physicians will not be enough. First, the lines proposed here

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(particularly the requirement of a knowing and voluntary decision by the patient) would be more difficult to draw than the lines that have limited *784 other recently recognized due process rights. Limiting a State from prosecuting use of artificial contraceptives by married couples posed no practical threat to the State's capacity to regulate contraceptives in other ways that were assumed at the time of *Poe* to be legitimate; the trimester measurements of *Roe* and the viability determination of *Casey* were easy to make with a real degree of certainty. But the knowing and responsible mind is harder to assess. [FN16] Second, this difficulty could become the greater by combining with another fact within the realm of plausibility, that physicians simply would not be assiduous to preserve the line. They have compassion, and those who would be willing to assist in suicide at all might be the most susceptible to the wishes of a patient, whether the patient was technically quite responsible or not. Physicians, and their hospitals, have their own financial incentives, too, in this new age of managed care. Whether acting from compassion or under *785 some other influence, a physician who would provide a drug for a patient to administer might well go the further step of administering the drug himself; so, the barrier between assisted suicide and euthanasia could become porous, and the line between voluntary and involuntary euthanasia as well. [FN17] The case for the slippery slope is fairly made out here, not because recognizing one due process right would leave a court with no principled basis to avoid recognizing another, but because there is a plausible case that the right claimed would not be readily containable by reference to facts about the mind that are matters of difficult judgment, or by gatekeepers who are subject to temptation, noble or not.

> FN16. While it is also more difficult to assess in cases involving limitations on life incidental to pain medication and the disconnection of artificial life support, there are reasons to justify a lesser concern with the punctilio of responsibility in these instances. The purpose of requesting and giving the medication is presumably not to cause death but to relieve the pain so that the State's interest in preserving life is not unequivocally implicated by the practice; and the importance of pain relief is so clear that there is less likelihood that relieving pain would run counter to what a responsible patient would choose, even with the consequences for life expectancy. As for ending artificial life support, the State again may see its interest in preserving life as weaker here than in the general case just because artificial life support preserves life when nature would not; and, because such life support is a frequently offensive bodily intrusion, there is a lesser reason to fear that a decision to remove it would not be the choice of one fully responsible. Where, however, a physician writes a prescription to equip a patient to end life, the prescription is written to serve an affirmative intent to die (even though the physician need not and probably does not characteristically have an intent that the patient die but only that the patient be equipped to make the decision). The patient's responsibility and competence are therefore crucial when the physician is presented with the request.
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> FN17. Again, the same can be said about life support and shortening life to kill pain, but the calculus may be viewed as different in these instances, as noted just above.

Respondents propose an answer to all this, the answer of state regulation with teeth. Legislation proposed in several States, for example, would authorize physician-assisted suicide but require two qualified physicians to confirm the patient's diagnosis, prognosis, and competence; and would mandate that the patient make repeated requests witnessed by at least two others over a specified timespan; and would impose reporting requirements and criminal penalties for various acts of coercion. See App. to Brief for State Legislators as *Amici Curiae* 1a-2a.

But at least at this moment there are reasons for caution in predicting the effectiveness **2292 of the teeth proposed. Respondents' proposals, as it turns out, sound much like the guidelines now in place in the Netherlands, the only place where

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experience with physician-assisted suicide and euthanasia has yielded empirical evidence about how such regulations might affect actual practice. Dutch physicians must engage in consultation before proceeding, and must decide whether the patient's decision is voluntary, well considered, and stable, whether the request to die is enduring and made more than once, and whether the patient's future will involve ***786** unacceptable suffering. See C. Gomez, Regulating Death 40-43 (1991). There is, however, a substantial dispute today about what the Dutch experience shows. Some commentators marshall evidence that the Dutch guidelines have in practice failed to protect patients from involuntary euthanasia and have been violated with impunity. See, *e.g.,* H. Hendin, Seduced By Death 75-84 (1997) (noting many cases in which decisions intended to end the life of a fully competent patient were made without a request from the patient and without consulting the patient); Keown, Euthanasia in the Netherlands: Sliding Down the Slippery Slope?, in Euthanasia Examined 261, 289 (J. Keown ed.1995) (guidelines have "proved signally ineffectual; non-voluntary euthanasia is now widely practised and increasingly condoned in the Netherlands"); Gomez, *supra,* at 104-113. This evidence is contested. See, *e.g.,* R. Epstein, Mortal Peril 322 (1997) ("Dutch physicians are not euthanasia enthusiasts and they are slow to practice it in individual cases"); R. Posner, Aging and Old Age 242, and n. 23 (1995) (noting fear of "doctors' rushing patients to their death" in the Netherlands "has not been substantiated and does not appear realistic"); Van der Wal, Van Eijk, Leenen, & Spreeuwenberg, Euthanasia and Assisted Suicide, 2, Do Dutch Family Doctors Act Prudently?, 9 Family Practice 135 (1992) (finding no serious abuse in Dutch practice). The day may come when we can say with some assurance which side is right, but for now it is the substantiality of the factual disagreement, and the alternatives for resolving it, that matter. They are, for me, dispositive of the due process claim at this time.

I take it that the basic concept of judicial review with its possible displacement of legislative judgment bars any finding that a legislature has acted arbitrarily when the following conditions are met: there is a serious factual controversy over the feasibility of recognizing the claimed right without at the same time making it impossible for the State to engage in an undoubtedly legitimate exercise of power; facts ***787** necessary to resolve the controversy are not readily ascertainable through the judicial process; but they are more readily subject to discovery through legislative factfinding and experimentation. It is assumed in this case, and must be, that a State's interest in protecting those unable to make responsible decisions and those who make no decisions at all entitles the State to bar aid to any but a knowing and responsible person intending suicide, and to prohibit euthanasia. How, and how far, a State should act in that interest are judgments for the State, but the legitimacy of its action to deny a physician the option to aid any but the knowing and responsible is beyond question.

The capacity of the State to protect the others if respondents were to prevail is, however, subject to some genuine question, underscored by the responsible disagreement over the basic facts of the Dutch experience. This factual controversy is not open to a judicial resolution with any substantial degree of assurance at this time. It is not, of course, that any controversy about the factual predicate of a due process claim disqualifies a court from resolving it. Courts can recognize captiousness, and most factual issues can be settled in a trial court. At this point, however, the factual issue at the heart of this case does not appear to be one of those. The principal enquiry at the moment is into the Dutch experience, and I question whether an independent front-line investigation into the facts of a foreign country's legal administration can be soundly undertaken through American courtroom litigation. While an extensive literature on any subject can raise the hopes for judicial understanding, the literature on this subject is only nascent. Since there is little experience directly bearing on the issue, the most that can ****2293** be said is that whichever way the Court might rule today, events could overtake its assumptions, as experimentation in some jurisdictions confirmed or discredited the concerns about progression from assisted suicide to euthanasia.

***788** Legislatures, on the other hand, have superior opportunities to obtain the facts necessary for a

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judgment about the present controversy. Not only do they have more flexible mechanisms for factfinding than the Judiciary, but their mechanisms include the power to experiment, moving forward and pulling back as facts emerge within their own jurisdictions. There is, indeed, good reason to suppose that in the absence of a judgment for respondents here, just such experimentation will be attempted in some of the States. See, *e.g.*, Ore.Rev.Stat. § 127.800 *et seq.* (Supp.1996); App. to Brief for State Legislators as *Amici Curiae* 1a (listing proposed statutes).

I do not decide here what the significance might be of legislative foot dragging in ascertaining the facts going to the State's argument that the right in question could not be confined as claimed. Sometimes a court may be bound to act regardless of the institutional preferability of the political branches as forums for addressing constitutional claims. See, *e.g.*, *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954). Now, it is enough to say that our examination of legislative reasonableness should consider the fact that the Legislature of the State of Washington is no more obviously at fault than this Court is in being uncertain about what would happen if respondents prevailed today. We therefore have a clear question about which institution, a legislature or a court, is relatively more competent to deal with an emerging issue as to which facts currently unknown could be dispositive. The answer has to be, for the reasons already stated, that the legislative process is to be preferred. There is a closely related further reason as well.

One must bear in mind that the nature of the right claimed, if recognized as one constitutionally required, would differ in no essential way from other constitutional rights guaranteed by enumeration or derived from some more definite textual source than "due process." An unenumerated right should not therefore be recognized, with the effect ***789** of displacing the legislative ordering of things, without the assurance that its recognition would prove as durable as the recognition of those other rights differently derived. To recognize a right of lesser promise would simply create a constitutional regime too uncertain to bring with it the expectation of finality that is one of this Court's central obligations in making constitutional decisions. See *Casey*, 505 U.S., at 864-869, 112 S.Ct., at 2813-2816.

Legislatures, however, are not so constrained. The experimentation that should be out of the question in constitutional adjudication displacing legislative judgments is entirely proper, as well as highly desirable, when the legislative power addresses an emerging issue like assisted suicide. The Court should accordingly stay its hand to allow reasonable legislative consideration. While I do not decide for all time that respondents' claim should not be recognized, I acknowledge the legislative institutional competence as the better one to deal with that claim at this time.

521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772, 65 USLW 4669, 97 Cal. Daily Op. Serv. 5008, 97 Daily Journal D.A.R. 8150, 97 CJ C.A.R. 1067, 11 Fla. L. Weekly Fed. S 190

Briefs and Other Related Documents (Back to top)

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THE WASHINGTON STATE PSYCHOLOGICAL ASSOCIATION, THE AMERICAN COUNSELING ASSOCIATION, THE ASSOCIATION FOR GAY, LESBIAN AND BISEXUAL ISSUES IN COUNSELING, AND A COALITION OF MENTAL HEALTH PROFESSIONALS AS AMICI CURIAE IN SUPPORT OF RESPONDENT (Dec. 10, 1996)

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• 1996 WL 663185 (Appellate Brief) BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS (Nov. 12, 1996)

• 1996 WL 663194 (Appellate Brief) BRIEF OF AMICUS CURIAE STATE OF OREGON IN SUPPORT OF PETITIONERS STATE OF WASHINGTON, ET AL. (Nov. 12, 1996)

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123 S.Ct. 2411 Page 1
539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257, 71 USLW 4480, 91 Fair Empl.Prac.Cas. (BNA) 1803, 84 Empl. Prac. Dec. P 41,416, 177 Ed. Law Rep. 851, 3 Cal. Daily Op. Serv. 5362, 2003 Daily Journal D.A.R. 6783, 16 Fla. L. Weekly Fed. S 387
(Cite as: 539 U.S. 244, 123 S.Ct. 2411)

Briefs and Other Related Documents

Supreme Court of the United States

Jennifer GRATZ and Patrick Hamacher, Petitioners,
v.
Lee BOLLINGER et al.

No. 02-516.

Argued April 1, 2003.
Decided June 23, 2003.

Rejected Caucasian in-state applicants for admission to University of Michigan's College of Literature, Science and the Arts (LSA) filed class action complaint against, inter alia, board of regents alleging that university's use of racial preferences in undergraduate admissions violated Equal Protection Clause, Title VI, and § 1981 and seeking, inter alia, compensatory and punitive damages for past violations, declaratory and injunctive relief, and order requiring LSA to offer one of them admission as transfer student. Action was certified as class action and bifurcated into damages and liability phases. On cross-motions for summary judgment with respect to liability phase only, the United States District Court for the Eastern District of Michigan, 122 F.Supp.2d 811, Patrick J. Duggan, J., granted petitioners' motion with respect to admissions programs in existence from 1995 through 1998, but denied motion with respect to admissions programs for 1999 and 2000. During pendency of interlocutory appeal to the United States Court of Appeals for the Sixth Circuit, certiorari was granted. The Supreme Court, Chief Justice Rehnquist, held that: (1) petitioners had standing to seek declaratory and injunctive relief; (2) university's current freshman admissions policy violated Equal Protection Clause because its use of race was not narrowly tailored to achieve respondents' asserted compelling state interest in diversity; and (3) Title VI and § 1981 were also violated by that policy.

Reversed in part and remanded.

Justice O'Connor filed concurring opinion in which Justice Breyer joined in part.

Justice Thomas filed concurring opinion.

Justice Breyer filed opinion concurring in the judgment.

Justice Souter filed dissenting opinion in which Justice Ginsburg joined in part.

Justice Ginsburg filed dissenting opinion in which Justice Souter joined and Justice Breyer joined in part.

West Headnotes

[1] Constitutional Law ⇐42.2(2)
92k42.2(2) Most Cited Cases
Intent may be relevant to standing in Equal Protection challenge. U.S.C.A. Const. Art. 3, § 2, cl. 1; U.S.C.A. Const.Amend. 14.

[2] Constitutional Law ⇐42.2(2)
92k42.2(2) Most Cited Cases
The injury in fact necessary to establish standing in case involving an Equal Protection challenge is denial of equal treatment resulting from imposition of barrier, not ultimate inability to obtain benefit; in face of such barrier, to establish standing party need only demonstrate that it is ready and able to perform and that discriminatory policy prevents it from doing so on equal basis. U.S.C.A. Const. Art. 3, § 2, cl. 1; U.S.C.A. Const.Amend. 14.

[3] Constitutional Law ⇐42.2(2)
92k42.2(2) Most Cited Cases
Caucasian applicant for admission to University of Michigan College of Literature, Science and the Arts (LSA) had standing to seek prospective relief with respect to Equal Protection challenge to

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University's continued use of race in undergraduate admissions, regardless of whether he actually applied for admission as transfer student; when he applied to University as freshman applicant, he was denied admission even though underrepresented minority applicant with his qualifications would have been admitted, and after being denied admission he demonstrated that he was "able and ready" to apply as transfer student should University cease to use race in undergraduate admissions. U.S.C.A. Const. Art. 3, § 2, cl. 1; U.S.C.A. Const.Amend. 14.

[4] Federal Civil Procedure ⇐187.5
170Ak187.5 Most Cited Cases
State university's use of race in undergraduate transfer admissions did not differ from its use of race in undergraduate freshman admissions, so fact that petitioner was transfer applicant did not bar his standing to represent absent class members challenging freshman admissions or make him inadequate representative of that class; guidelines used to evaluate transfer applicants specifically cross-referenced factors and qualifications considered in assessing freshman applicants, criteria used to determine whether transfer applicant would contribute to university's stated goal of diversity were identical to those used to evaluate freshman applicants, and sole difference that all underrepresented minority freshman applicants received 20 points and "virtually" all who were minimally qualified were admitted whereas "generally" all minimally qualified minority transfer applicants were admitted outright, though possibly relevant to narrow tailoring analysis, clearly had no effect on applicant's standing. U.S.C.A. Const. Art. 3, § 2, cl. 1; Fed.Rules Civ.Proc.Rule 23(a)(4), 28 U.S.C.A.

[5] Colleges and Universities ⇐9.15
81k9.15 Most Cited Cases
[5] Constitutional Law ⇐220(3)
92k220(3) Most Cited Cases
State university's interest in achieving educational diversity could constitute compelling state interest capable of supporting narrowly tailored means, for purposes of determining whether that university's policy of using race in undergraduate admissions decisions violated Equal Protection Clause of Fourteenth Amendment. U.S.C.A. Const.Amend. 14

[6] Constitutional Law ⇐215
92k215 Most Cited Cases
All racial classifications reviewable under Equal Protection Clause must be strictly scrutinized, and this standard of review is not dependent on race of those burdened or benefited by a particular classification; thus, any person, of whatever race, has right to demand that any governmental actor subject to Constitution justify any racial classification subjecting that person to unequal treatment under strictest of judicial scrutiny. U.S.C.A. Const.Amend. 14.

[7] Colleges and Universities ⇐9.15
81k9.15 Most Cited Cases
[7] Constitutional Law ⇐220(3)
92k220(3) Most Cited Cases
Equal protection rights of Caucasian applicants to University of Michigan's undergraduate College of Literature, Science and the Arts (LSA) were violated by University's policy of automatically distributing 20 points, or one-fifth of those needed to guarantee admission, to every single "underrepresented minority" applicant solely because of race; that policy was not narrowly tailored to asserted compelling state interest in achieving educational diversity. U.S.C.A. Const.Amend. 14.

[8] Civil Rights ⇐1055
78k1055 Most Cited Cases
(Formerly 78k126)
Discrimination that violates Equal Protection Clause of Fourteenth Amendment committed by institution that accepts federal funds also constitutes violation of Title VI. U.S.C.A. Const.Amend. 14; Civil Rights Act of 1964, § 601, 42 U.S.C.A. § 2000d.

[9] Civil Rights ⇐1041
78k1041 Most Cited Cases
(Formerly 78k118)
[9] Civil Rights ⇐1061
78k1061 Most Cited Cases
(Formerly 78k127.1)
Section 1981 was meant, by its broad terms, to proscribe discrimination in making or enforcement of contracts against, or in favor of, any race, and contract for educational services is "contract" for purposes of that statute. 42 U.S.C.A. § 1981.

[10] Civil Rights ⇐1033(1)

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78k1033(1) Most Cited Cases
(Formerly 78k111)
Purposeful discrimination that violates Equal Protection Clause of Fourteenth Amendment will also violate § 1981. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1981.

[11] Civil Rights ⇐1061
78k1061 Most Cited Cases
(Formerly 78k127.1)
Because Equal Protection Clause was violated thereby, Title VI and § 1981 were also violated by state university's undergraduate admissions policy of automatically distributing 20 points, or one-fifth of those needed to guarantee admission, to every single "underrepresented minority" applicant solely because of race. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 601, 42 U.S.C.A. § 2000d.

****2413** ***244** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Petitioners Gratz and Hamacher, both of whom are Michigan residents and Caucasian, applied for admission to the University of Michigan's (University) College of Literature, Science, and the Arts (LSA) in 1995 and 1997, respectively. Although the LSA considered Gratz to be well qualified and Hamacher to be within the qualified range, both were denied early admission and were ultimately denied admission. In order to promote consistency in the ****2414** review of the many applications received, the University's Office of Undergraduate Admissions (OUA) uses written guidelines for each academic year. The guidelines have changed a number of times during the period relevant to this litigation. The OUA considers a number of factors in making admissions decisions, including high school grades, standardized test scores, high school quality, curriculum strength, geography, alumni relationships, leadership, and race. During all relevant periods, the University has considered African-Americans, Hispanics, and Native Americans to be "underrepresented minorities," and it is undisputed that the University admits virtually every qualified applicant from these groups. The current guidelines use a selection method under which every applicant from an underrepresented racial or ethnic minority group is automatically awarded 20 points of the 100 needed to guarantee admission.

Petitioners filed this class action alleging that the University's use of racial preferences in undergraduate admissions violated the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. § 1981. They sought compensatory and punitive damages for past violations, declaratory relief finding that respondents violated their rights to nondiscriminatory treatment, an injunction prohibiting respondents from continuing to discriminate on the basis of race, and an order requiring the LSA to offer Hamacher admission as a transfer student. The District Court granted petitioners' motion to certify a class consisting of individuals who applied for and were denied admission to the LSA for academic year 1995 and forward and who are members of racial or ethnic groups that respondents treated less favorably on the basis of race. Hamacher, whose claim was found to challenge racial discrimination on a classwide basis, was designated as the class representative. On cross-motions for summary judgment, respondents relied on Justice Powell's principal opinion in ***245***Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 317, 98 S.Ct. 2733, 57 L.Ed.2d 750, which expressed the view that the consideration of race as a factor in admissions might in some cases serve a compelling government interest. Respondents contended that the LSA has just such an interest in the educational benefits that result from having a racially and ethnically diverse student body and that its program is narrowly tailored to serve that interest. The court agreed with respondents as to the LSA's current admissions guidelines and granted them summary judgment in that respect. However, the court also found that the LSA's admissions guidelines for 1995 through 1998 operated as the functional equivalent of a quota running afoul of Justice Powell's *Bakke* opinion, and thus granted petitioners summary judgment with respect to respondents' admissions programs

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for those years. While interlocutory appeals were pending in the Sixth Circuit, that court issued an opinion in *Grutter v. Bollinger*, 288 F.3d 732, upholding the admissions program used by the University's Law School. This Court granted certiorari in both cases, even though the Sixth Circuit had not yet rendered judgment in this one.

Held:

1. Petitioners have standing to seek declaratory and injunctive relief. The Court rejects Justice STEVENS' contention that, because Hamacher did not actually apply for admission as a transfer student, his future injury claim is at best conjectural or hypothetical rather than real and immediate. The "injury in fact" necessary to establish standing in this type of case is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. 656, 666, 113 S.Ct. 2297, 124 L.Ed.2d 586. In the face of such a barrier, to establish standing, a party need only demonstrate that it is able and ready to perform and that a discriminatory ****2415** policy prevents it from doing so on an equal basis. *Ibid.* In bringing his equal protection challenge against the University's use of race in undergraduate admissions, Hamacher alleged that the University had denied him the opportunity to compete for admission on an equal basis. Hamacher was denied admission to the University as a freshman applicant even though an underrepresented minority applicant with his qualifications would have been admitted. After being denied admission, Hamacher demonstrated that he was "able and ready" to apply as a transfer student should the University cease to use race in undergraduate admissions. He therefore has standing to seek prospective relief with respect to the University's continued use of race. Also rejected is Justice STEVENS' contention that such use in undergraduate transfer admissions differs from the University's use of race in undergraduate freshman admissions, so that Hamacher lacks standing to represent absent class members challenging the latter. Each year the OUA produces a document setting forth ***246** guidelines for those seeking admission to the LSA, including freshman and transfer applicants. The transfer applicant guidelines specifically cross-reference factors and qualifications considered in assessing freshman applicants. In fact, the criteria used to determine whether a transfer applicant will contribute to diversity are *identical* to those used to evaluate freshman applicants. The *only* difference is that all underrepresented minority freshman applicants receive 20 points and "virtually" all who are minimally qualified are admitted, while "generally" all minimally qualified minority transfer applicants are admitted outright. While this difference might be relevant to a narrow tailoring analysis, it clearly has no effect on petitioners' standing to challenge the University's use of race in undergraduate admissions and its assertion that diversity is a compelling state interest justifying its consideration of the race of its undergraduate applicants. See *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 159, 102 S.Ct. 2364, 72 L.Ed.2d 740; *Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534, distinguished. The District Court's carefully considered decision to certify this class action is correct. Cf. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469, 98 S.Ct. 2454, 57 L.Ed.2d 351. Hamacher's personal stake, in view of both his past injury and the potential injury he faced at the time of certification, demonstrates that he may maintain the action. Pp. 2422-2426.

2. Because the University's use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents' asserted interest in diversity, the policy violates the Equal Protection Clause. For the reasons set forth in *Grutter v. Bollinger, ante*, at ---- - ----, 123 S.Ct., at 2338- 2341, 2003 WL 21433492, the Court has today rejected petitioners' argument that diversity cannot constitute a **compelling** state **interest**. However, the Court finds that the University's current policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single "underrepresented minority" applicant solely because of race, is not narrowly tailored to achieve educational diversity. In *Bakke*, Justice Powell explained his view that it would be permissible for a university to employ an admissions program in which "race or ethnic background may be deemed a 'plus' in a particular applicant's file." 438 U.S., at

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317, 98 S.Ct. 2733. He emphasized, however, the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education. The admissions program Justice Powell described did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university's diversity. See *id.*, at 315, 98 S.Ct. 2733. The current LSA policy does ****2416** not provide the individualized consideration Justice Powell contemplated. The only consideration that accompanies the 20-point automatic distribution to all applicants from underrepresented minorities is a factual review to determine whether an individual is a member ***247** of one of these minority groups. Moreover, unlike Justice Powell's example, where the race of a "particular black applicant" could be considered without being decisive, see *id.*, at 317, 98 S.Ct. 2733, the LSA's 20-point distribution has the effect of making " the factor of race ... decisive" for virtually every minimally qualified underrepresented minority applicant, *ibid.* The fact that the LSA has created the possibility of an applicant's file being flagged for individualized consideration only emphasizes the flaws of the University's system as a whole when compared to that described by Justice Powell. The record does not reveal precisely how many applications are flagged, but it is undisputed that such consideration is the exception and not the rule in the LSA's program. Also, this individualized review is only provided *after* admissions counselors automatically distribute the University's version of a "plus" that makes race a decisive factor for virtually every minimally qualified underrepresented minority applicant. The Court rejects respondents' contention that the volume of applications and the presentation of applicant information make it impractical for the LSA to use the admissions system upheld today in *Grutter*. The fact that the implementation of a program capable of providing individualized consideration might present **administrative** challenges does not render constitutional an otherwise problematic system. See, *e.g., Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508, 109 S.Ct. 706, 102 L.Ed.2d 854. Nothing in Justice Powell's *Bakke* opinion signaled that a university may employ whatever means it desires to achieve diversity without regard to the limits imposed by strict scrutiny. Pp. 2426-2430.

3. Because the University's use of race in its current freshman admissions policy violates the Equal Protection Clause, it also violates Title VI and § 1981. See, *e.g., Alexander v. Sandoval,* 532 U.S. 275, 281, 121 S.Ct. 1511, 149 L.Ed.2d 517; *General Building Contractors Assn. v. Pennsylvania,* 458 U.S. 375, 389-390, 102 S.Ct. 3141, 73 L.Ed.2d 835. Accordingly, the Court reverses that portion of the District Court's decision granting respondents summary judgment with respect to liability. Pp. 2430- 2431.

Reversed in part and remanded.

REHNQUIST, C.J. delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. O'CONNOR, J., filed a concurring opinion, in which BREYER, J., joined in part. THOMAS, J., filed a concurring opinion. BREYER, J., filed an opinion concurring in the judgment. STEVENS, J., filed a dissenting opinion, in which SOUTER, J., joined. SOUTER, J., filed a dissenting opinion, in which GINSBURG, J., joined as to Part II. GINSBURG, J., filed a dissenting opinion, in which SOUTER, J., joined, and in which BREYER, J., joined as to Part I.

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*249 Chief Justice REHNQUIST delivered the opinion of the Court.

We granted certiorari in this case to decide whether "the University of Michigan's use of racial preferences in undergraduate *250 admissions violate[s] the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), or 42 U.S.C. § 1981." Brief *251 for Petitioners i. Because we find that the manner in which the University considers the race of applicants in its undergraduate admissions guidelines violates these constitutional and statutory provisions, we reverse that portion of the District Court's decision upholding the guidelines.

I
A

Petitioners Jennifer Gratz and Patrick Hamacher both applied for admission to the University of Michigan's (University) College of Literature, Science, and the Arts (LSA) as residents of the State of Michigan. Both petitioners are Caucasian. Gratz, who applied for admission for the fall of 1995, was notified in January of that year that a final decision regarding her admission had been delayed until April. This delay was based upon the University's determination that, although Gratz was " 'well qualified,' " she was " 'less competitive than the students who ha[d] been admitted on first review.' " App. to Pet. for Cert. 109a. Gratz was notified in April that the LSA was unable to offer her admission. She enrolled in the University of Michigan at Dearborn, from which she graduated in the spring of 1999.

Hamacher applied for admission to the LSA for the fall of 1997. A final decision as to his application was also postponed because, though his " 'academic credentials [were] in the qualified range, they [were] not at the level needed for first review admission.' " *Ibid.* Hamacher's application was subsequently denied in April 1997, and he enrolled at Michigan State University. [FN1]

> FN1. Although Hamacher indicated that he "intend[ed] to apply to transfer if the [LSA's] discriminatory admissions system [is] eliminated," he has since graduated from Michigan State University. App. 34.

*252 In October 1997, Gratz and Hamacher filed a lawsuit in the United States District Court for the Eastern District of Michigan **2418 against the University of Michigan, the LSA, [FN2] James Duderstadt, and Lee Bollinger. [FN3] Petitioners' complaint was a class-action suit alleging "violations and threatened violations of the rights of the plaintiffs and the class they represent to equal protection of the laws under the Fourteenth Amendment ..., and for racial discrimination in violation of 42 U.S.C. §§ 1981, 1983, and 2000d *et seq.*" App. 33. Petitioners sought, *inter alia,* compensatory and punitive damages for past

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violations, declaratory relief finding that respondents violated petitioners' "rights to nondiscriminatory treatment," an injunction prohibiting respondents from " continuing to discriminate on the basis of race in violation of the Fourteenth Amendment," and an order requiring the LSA to offer Hamacher admission as a transfer student. [FN4] *Id.*, at 40.

FN2. The University of Michigan Board of Regents was subsequently named as the proper defendant in place of the University and the LSA. See *id.*, at 17.

FN3. Duderstadt was the president of the University during the time that Gratz's application was under consideration. He has been sued in his individual capacity. Bollinger was the president of the University when Hamacher applied for admission. He was originally sued in both his individual and official capacities, but he is no longer the president of the University. *Id.*, at 35.

FN4. A group of African-American and Latino students who applied for, or intended to apply for, admission to the University, as well as the Citizens for Affirmative Action's Preservation, a nonprofit organization in Michigan, sought to intervene pursuant to Federal Rule of Civil Procedure 24. See App. 13-14. The District Court originally denied this request, see *id.*, at 14-15, but the Sixth Circuit reversed that decision. See *Gratz v. Bollinger,* 188 F.3d 394 (1999).

The District Court granted petitioners' motion for class certification after determining that a class action was appropriate pursuant to Federal Rule of Civil Procedure 23(b)(2). The certified class consisted of "those individuals who applied for and were not granted admission to the College of ***253** Literature, Science and the Arts of the University of Michigan for all academic years from 1995 forward and who are members of those racial or ethnic groups, including Caucasian, that defendants treated less favorably on the basis of race in considering their application for admission." App. 70-71. And Hamacher, whose claim the District Court found to challenge a " 'practice of racial discrimination pervasively applied on a classwide basis,' " was designated as the class representative. *Id.*, at 67, 70. The court also granted petitioners' motion to bifurcate the proceedings into a liability and damages phase. *Id.*, at 71. The liability phase was to determine " whether [respondents'] use of race as a factor in admissions decisions violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution." *Id.*, at 70. [FN5]

FN5. The District Court decided also to consider petitioners' request for injunctive and declaratory relief during the liability phase of the proceedings. App. 71.

B

The University has changed its admissions guidelines a number of times during the period relevant to this litigation, and we summarize the most significant of these changes briefly. The University's Office of Undergraduate Admissions (OUA) oversees the LSA admissions process. [FN6] In order to promote consistency in the review of the large number of applications received, the OUA uses written guidelines for each academic year. Admissions counselors make admissions decisions in accordance with these guidelines.

FN6. Our description is taken, in large part, from the "Joint Proposed Summary of Undisputed Facts Regarding Admissions Process" filed by the parties in the District Court. App. to Pet. for Cert. 108a-117a.

OUA considers a number of factors in making admissions decisions, including high school grades, standardized test scores, high school quality, curriculum ****2419** strength, geography, alumni relationships, and leadership. OUA also considers race. During all periods relevant to this litigation, the University ***254** has considered African-Americans, Hispanics, and Native Americans to be "underrepresented minorities," and it is undisputed that the University admits "virtually every qualified ... applicant" from these groups.

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App. to Pet. for Cert. 111a.

During 1995 and 1996, OUA counselors evaluated applications according to grade point average combined with what were referred to as the "SCUGA" factors. These factors included the quality of an applicant's high school (S), the strength of an applicant's high school curriculum (C), an applicant's unusual circumstances (U), an applicant's geographical residence (G), and an applicant's alumni relationships (A). After these scores were combined to produce an applicant's "GPA 2" score, the reviewing admissions counselors referenced a set of "Guidelines" tables, which listed GPA 2 ranges on the vertical axis, and American College Test/Scholastic Aptitude Test (ACT/SAT) scores on the horizontal axis. Each table was divided into cells that included one or more courses of action to be taken, including admit, reject, delay for additional information, or postpone for reconsideration.

In both years, applicants with the same GPA 2 score and ACT/SAT score were subject to different admissions outcomes based upon their racial or ethnic status. [FN7] For example, as a Caucasian in-state applicant, Gratz's GPA 2 score and ACT score placed her within a cell calling for a postponed decision on her application. An in-state or out-of-state minority applicant with Gratz's scores would have fallen within a cell calling for admission.

> FN7. In 1995, counselors used four such tables for different groups of applicants: (1) in-state, nonminority applicants; (2) out-of-state, non-minority applicants; (3) in-state, minority applicants; and (4) out-of-state, minority applicants. In 1996, only two tables were used, one for in-state applicants and one for out-of-state applicants. But each cell on these two tables contained separate courses of action for minority applicants and nonminority applicants whose GPA 2 scores and ACT/SAT scores placed them in that cell.

***255** In 1997, the University modified its admissions procedure. Specifically, the formula for calculating an applicant's GPA 2 score was restructured to include additional point values under the "U" category in the SCUGA factors. Under this new system, applicants could receive points for underrepresented minority status, socioeconomic disadvantage, or attendance at a high school with a predominantly underrepresented minority population, or underrepresentation in the unit to which the student was applying (for example, men who sought to pursue a career in nursing). Under the 1997 procedures, Hamacher's GPA 2 score and ACT score placed him in a cell on the in-state applicant table calling for postponement of a final admissions decision. An underrepresented minority applicant placed in the same cell would generally have been admitted.

Beginning with the 1998 academic year, the OUA dispensed with the Guidelines tables and the SCUGA point system in favor of a "selection index," on which an applicant could score a maximum of 150 points. This index was divided linearly into ranges generally calling for admissions dispositions as follows: 100-150 (admit); 95-99 (admit or postpone); 90-94 (postpone or admit); 75-89 (delay or postpone); 74 and below (delay or reject).

Each application received points based on high school grade point average, standardized test scores, academic quality of an applicant's high school, strength or weakness of high school curriculum, in-state residency, alumni relationship, personal essay, and personal achievement or leadership. Of particular significance here, under a "miscellaneous" category, an applicant was entitled to 20 points based upon his or her membership in an underrepresented racial or ethnic minority group. The University explained that the ****2420** " 'development of the selection index for admissions in 1998 changed only the mechanics, not the substance of how race and ethnicity were considered in admissions.' " App. to Pet. for Cert. 116a.

***256** In all application years from 1995 to 1998, the guidelines provided that qualified applicants from underrepresented minority groups be admitted as soon as possible in light of the University's belief

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that such applicants were more likely to enroll if promptly notified of their admission. Also from 1995 through 1998, the University carefully managed its rolling admissions system to permit consideration of certain applications submitted later in the academic year through the use of "protected seats." Specific groups--including athletes, foreign students, ROTC candidates, and underrepresented minorities-- were "protected categories" eligible for these seats. A committee called the Enrollment Working Group (EWG) projected how many applicants from each of these protected categories the University was likely to receive after a given date and then paced admissions decisions to permit full consideration of expected applications from these groups. If this space was not filled by qualified candidates from the designated groups toward the end of the admissions season, it was then used to admit qualified candidates remaining in the applicant pool, including those on the waiting list.

During 1999 and 2000, the OUA used the selection index, under which every applicant from an underrepresented racial or ethnic minority group was awarded 20 points. Starting in 1999, however, the University established an Admissions Review Committee (ARC), to provide an additional level of consideration for some applications. Under the new system, counselors may, in their discretion, "flag" an application for the ARC to review after determining that the applicant (1) is academically prepared to succeed at the University, [FN8] (2) has achieved a minimum selection index score, and (3) possesses a quality or characteristic important to the University's composition ***257** of its freshman class, such as high class rank, unique life experiences, challenges, circumstances, interests or talents, socioeconomic disadvantage, and underrepresented race, ethnicity, or geography. After reviewing "flagged" applications, the ARC determines whether to admit, defer, or deny each applicant.

> FN8. LSA applicants who are Michigan residents must accumulate 80 points from the selection index criteria to be flagged, while out-of-state applicants need to accumulate 75 points to be eligible for such consideration. See App. 257.

C

The parties filed cross-motions for summary judgment with respect to liability. Petitioners asserted that the LSA's use of race as a factor in admissions violates Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000d, and the Equal Protection Clause of the Fourteenth Amendment. Respondents relied on Justice Powell's opinion in *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), to respond to petitioners' arguments. As discussed in greater detail in the Court's opinion in *Grutter v. Bollinger, ante,* at ---- - ----, 123 S.Ct. 2336-2337, 2003 WL 21433492, Justice Powell, in *Bakke,* expressed the view that the consideration of race as a factor in admissions might in some cases serve a compelling government interest. See 438 U.S., at 317, 98 S.Ct. 2733. Respondents contended that the LSA has just such an interest in the educational benefits that result from having a racially and ethnically diverse student body and that its program is narrowly tailored to serve that interest. Respondent-intervenors asserted that the LSA had a compelling interest in remedying the University's past and current discrimination against minorities. [FN9]

> FN9. The District Court considered and rejected respondent-intervenors' arguments in a supplemental opinion and order. See 135 F.Supp.2d 790 (E.D.Mich.2001). The court explained that respondent-intervenors "failed to present any evidence that the discrimination alleged by them, or the continuing effects of such discrimination, was the real justification for the LSA's race-conscious admissions programs." *Id.,* at 795. We agree, and to the extent respondent-intervenors reassert this justification, a justification the University has *never* asserted throughout the course of this litigation, we affirm the District Court's disposition of the issue.

****2421 *258** The District Court began its analysis by reviewing this Court's decision in *Bakke.* See 122 F.Supp.2d 811, 817 (E.D.Mich.2000).

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Although the court acknowledged that no decision from this Court since *Bakke* has explicitly accepted the diversity rationale discussed by Justice Powell, see 122 F.Supp.2d, at 820-821, it also concluded that this Court had not, in the years since *Bakke*, ruled out such a justification for the use of race. 122 F.Supp.2d, at 820-821. The District Court concluded that respondents and their *amici curiae* had presented "solid evidence" that a racially and ethnically diverse student body produces significant educational benefits such that achieving such a student body constitutes a compelling governmental interest. See *id.*, at 822-824.

The court next considered whether the LSA's admissions guidelines were narrowly tailored to achieve that interest. See *id.*, at 824. Again relying on Justice Powell's opinion in *Bakke*, the District Court determined that the admissions program the LSA began using in 1999 is a narrowly tailored means of achieving the University's interest in the educational benefits that flow from a racially and ethnically diverse student body. See 122 F.Supp.2d, at 827. The court emphasized that the LSA's current program does not utilize rigid quotas or seek to admit a predetermined number of minority students. See *ibid.* The award of 20 points for membership in an underrepresented minority group, in the District Court's view, was not the functional equivalent of a quota because minority candidates were not insulated from review by virtue of those points. See *id.*, at 828. Likewise, the court rejected the assertion that the LSA's program operates like the two-track system Justice Powell found objectionable in *Bakke* on the grounds that LSA applicants are not competing for different groups of seats. See 122 F.Supp.2d, at 828-829. The court also dismissed petitioners' assertion that the LSA's current system is nothing more than a means by which to achieve racial balancing. See *id.*, at 831. The court explained that the LSA does not seek to ***259** achieve a certain proportion of minority students, let alone a proportion that represents the community. See *ibid.*

The District Court found the admissions guidelines the LSA used from 1995 through 1998 to be more problematic. In the court's view, the University's prior practice of "protecting" or "reserving" seats for underrepresented minority applicants effectively kept nonprotected applicants from competing for those slots. See *id.*, at 832. This system, the court concluded, operated as the functional equivalent of a quota and ran afoul of Justice Powell's opinion in *Bakke*. [FN10] See 122 F.Supp.2d, at 832.

> FN10. The District Court determined that respondents Bollinger and Duderstadt, who were sued in their individual capacities under Rev. Stat. § 1979, 42 U.S.C. § 1983, were entitled to summary judgment based on the doctrine of qualified immunity. See 122 F.Supp.2d, at 833-834. Petitioners have not asked this Court to review this aspect of the District Court's decision. The District Court denied the Board of Regents' motion for summary judgment with respect to petitioners' Title VI claim on Eleventh Amendment immunity grounds. See *id.*, at 834-836. Respondents have not asked this Court to review this aspect of the District Court's decision.

Based on these findings, the court granted petitioners' motion for summary judgment with respect to the LSA's admissions programs in existence from 1995 through 1998, and respondents' motion with respect to the LSA's admissions programs for 1999 and 2000. See *id.*, at 833. Accordingly, ****2422** the District Court denied petitioners' request for injunctive relief. See *id.*, at 814.

The District Court issued an order consistent with its rulings and certified two questions for interlocutory appeal to the Sixth Circuit pursuant to 28 U.S.C. § 1292(b). Both parties appealed aspects of the District Court's rulings, and the Court of Appeals heard the case en banc on the same day as *Grutter v. Bollinger*. The Sixth Circuit later issued an opinion in *Grutter*, upholding the admissions program used by the University of Michigan Law School, and the petitioner in that case sought a writ of certiorari from this Court. Petitioners asked this Court to grant certiorari in this case as ***260** well, despite the fact that the Court of Appeals had not yet rendered a judgment, so that this Court could

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address the constitutionality of the consideration of race in university admissions in a wider range of circumstances. We did so. See 537 U.S. 1044, 123 S.Ct. 617, 154 L.Ed.2d 514 (2002).

II

As they have throughout the course of this litigation, petitioners contend that the University's consideration of race in its undergraduate admissions decisions violates § 1 of the Equal Protection Clause of the Fourteenth Amendment, [FN11] Title VI, [FN12] and 42 U.S.C. § 1981. [FN13] We consider first whether petitioners have standing to seek declaratory and injunctive relief, and, finding that they do, we next consider the merits of their claims.

FN11. The Equal Protection Clause of the Fourteenth Amendment explains that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws."

FN12. Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

FN13. Section 1981(a) provides that: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, ... and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens."

A

Although no party has raised the issue, Justice STEVENS argues that petitioners lack Article III standing to seek injunctive relief with respect to the University's use of race in undergraduate admissions. He first contends that because Hamacher did not "actually appl[y] for admission as a transfer student[,][h]is claim of future injury is at best 'conjectural or hypothetical' rather than 'real and immediate.' " *Post,* at 2436 (dissenting opinion). But whether Hamacher "actually applied" for admission as a transfer student is not ***261** determinative of his ability to seek injunctive relief in this case. If Hamacher had submitted a transfer application and been rejected, he would still need to allege an intent to apply again in order to seek prospective relief. If Justice STEVENS means that because Hamacher did not apply to transfer, he must never *really* have intended to do so, that conclusion directly conflicts with the finding of fact entered by the District Court that Hamacher "intends to transfer to the University of Michigan when defendants cease the use of race as an admission preference." App. 67. [FN14]

FN14. This finding is further corroborated by Hamacher's request that the District Court "[r]equir[e] the LSA College to offer [him] admission as a transfer student." App. 40.

[1][2] It is well established that intent may be relevant to standing in an Equal Protection challenge. In *Clements v. Fashing,* 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982), for example, we considered a challenge to a provision of the Texas Constitution requiring the immediate resignation of certain state officeholders upon their announcement of candidacy for another office. We concluded that the ****2423** plaintiff officeholders had Article III standing because they had alleged that they *would have announced their candidacy* for other offices were it not for the "automatic resignation" provision they were challenging. *Id.,* at 962, 102 S.Ct. 2836; accord, *Turner v. Fouche,* 396 U.S. 346, 361-362, n. 23, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970) (plaintiff who did not own property had standing to challenge property ownership requirement for membership on school board even though there was no evidence that plaintiff had applied and been rejected); *Quinn v. Millsap,* 491 U.S. 95, 103, n. 8, 109 S.Ct. 2324, 105 L.Ed.2d 74 (1989) (plaintiffs who did not own property had standing to challenge property ownership requirement for membership on

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government board even though they lacked standing to challenge the requirement "as applied"). Likewise, in *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville,* 508 U.S. 656, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993), we considered whether an association challenging an ordinance that gave preferential treatment to certain ***262** minority-owned businesses in the award of city contracts needed to show that one of its members would have received a contract absent the ordinance in order to establish standing. In finding that no such showing was necessary, we explained that "[t]he 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit .... And in the context of a challenge to a set-aside program, the 'injury in fact' is the inability to compete on an equal footing in the bidding process, not the loss of contract." *Id.,* at 666, 113 S.Ct. 2297. We concluded that in the face of such a barrier, "[t]o establish standing, a party challenging a set-aside program like Jacksonville's need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." *Ibid.*

[3] In bringing his equal protection challenge against the University's use of race in undergraduate admissions, Hamacher alleged that the University had denied him the opportunity to compete for admission on an equal basis. When Hamacher applied to the University as a freshman applicant, he was denied admission even though an underrepresented minority applicant with his qualifications would have been admitted. See App. to Pet. for Cert. 115a. After being denied admission, Hamacher demonstrated that he was "able and ready" to apply as a transfer student should the University cease to use race in undergraduate admissions. He therefore has standing to seek prospective relief with respect to the University's continued use of race in undergraduate admissions.

[4] Justice STEVENS raises a second argument as to standing. He contends that the University's use of race in undergraduate transfer admissions differs from its use of race in undergraduate freshman admissions, and that therefore Hamacher lacks standing to represent absent class members challenging the latter. *Post,* at 2436 (dissenting opinion). ***263** As an initial matter, there is a question whether the relevance of this variation, if any, is a matter of Article III standing at all or whether it goes to the propriety of class certification pursuant to Federal Rule of Civil Procedure 23(a). The parties have not briefed the question of standing versus adequacy, however, and we need not resolve the question today: Regardless of whether the requirement is deemed one of adequacy or standing, it is clearly satisfied in this case. [FN15]

> FN15. Although we do not resolve here whether such an inquiry in this case is appropriately addressed under the rubric of standing or adequacy, we note that there is tension in our prior cases in this regard. See, *e.g.,* Burns, Standing and Mootness in Class Actions: A Search for Consistency, 22 U.C.D.L.Rev. 1239, 1240-1241 (1989); *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 149, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982) (Mexican-American plaintiff alleging that he was passed over for a promotion because of race was not an adequate representative to "maintain a class action on behalf of Mexican-American applicants" who were not hired by the same employer); *Blum v. Yaretsky,* 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982) (class representatives who had been transferred to lower levels of medical care lacked standing to challenge transfers to higher levels of care).

****2424** From the time petitioners filed their original complaint through their brief on the merits in this Court, they have consistently challenged the University's use of race in undergraduate admissions and its asserted justification of promoting "diversity." See, *e.g.,* App. 38; Brief for Petitioners 13. Consistent with this challenge, petitioners requested injunctive relief prohibiting respondent "from continuing to discriminate on the basis of race." App. 40. They sought to certify a

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class consisting of all individuals who were not members of an underrepresented minority group who either had applied for admission to the LSA and been rejected or who intended to apply for admission to the LSA, for all academic years from 1995 forward. *Id.,* at 35-36. The District Court determined that the proposed class satisfied the requirements of the Federal Rules of Civil Procedure, including the requirements of numerosity, commonality, and typicality. See Fed. Rule Civ. Proc. 23(a); App. 70. The court further concluded that Hamacher was an adequate representative ***264** for the class in the pursuit of compensatory and injunctive relief for purposes of Rule 23(a)(4), see App. 61-69, and found "the record utterly devoid of the presence of ... antagonism between the interests of ... Hamacher, and the members of the class which [he] seek[s] to represent," *id.,* at 61. Finally, the District Court concluded that petitioners' claim was appropriate for class treatment because the University's " 'practice of racial discrimination pervasively applied on a classwide basis.' " *Id.,* at 67. The court certified the class pursuant to Federal Rule of Civil Procedure 23(b)(2), and designated Hamacher as the class representative. App. 70.

Justice STEVENS cites *Blum v. Yaretsky,* 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982), in arguing that the District Court erred. *Post,* at 2437. In *Blum,* we considered a class action suit brought by Medicaid beneficiaries. The named representatives in *Blum* challenged decisions by the State's Medicaid Utilization Review Committee (URC) to transfer them to lower levels of care without, in their view, sufficient procedural safeguards. After a class was certified, the plaintiffs obtained an order expanding class certification to include challenges to URC decisions to transfer patients to *higher* levels of care as well. The defendants argued that the named representatives could not represent absent class members challenging transfers to higher levels of care because they had not been threatened with such transfers. We agreed. We noted that "[n]othing in the record ... suggests that any of the individual respondents have been either transferred to more intensive care or threatened with such transfers." 457 U.S., at 1001, 102 S.Ct. 2777. And we found that transfers to lower levels of care involved a number of fundamentally different concerns than did transfers to higher ones. *Id.,* at 1001-1002, 102 S.Ct. 2777 (noting, for example, that transfers to lower levels of care implicated beneficiaries' property interests given the concomitant decrease in Medicaid benefits, while transfers to higher levels of care did not).

***265** In the present case, the University's use of race in undergraduate transfer admissions does not implicate a significantly different set of concerns than does its use of race in undergraduate freshman admissions. Respondents challenged Hamacher's standing at the certification stage, but *never* did so on the grounds that the University's use of race in undergraduate transfer admissions involves a different set ****2425** of concerns than does its use of race in freshman admissions. respondents' failure to allege any such difference is simply consistent with the fact that no such difference exists. Each year the OUA produces a document entitled " COLLEGE OF LITERATURE SCIENCE AND THE ARTS GUIDELINES FOR ALL TERMS," which sets forth guidelines for all individuals seeking admission to the LSA, including freshman applicants, transfer applicants, international student applicants, and the like. See, *e.g.,* 2 App. in No. 01-1333 etc. (CA6), pp. 507-542. The guidelines used to evaluate transfer applicants specifically cross-reference factors and qualifications considered in assessing freshman applicants. In fact, the criteria used to determine whether a transfer applicant will contribute to the University's stated goal of diversity are *identical* to that used to evaluate freshman applicants. For example, in 1997, when the class was certified and the District Court found that Hamacher had standing to represent the class, the transfer guidelines contained a separate section entitled "CONTRIBUTION TO A DIVERSE STUDENT BODY." 2 *id.,* at 531. This section explained that any transfer applicant who could "*contribut[e] to a diverse student body*" should "generally be admitted" even with substantially lower qualifications than those required of other transfer applicants. *Ibid.* (emphasis added). To determine whether a transfer applicant was capable of "contribut[ing] to a diverse student body," admissions counselors were

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instructed to determine whether that transfer applicant met the "criteria as defined in Section IV of the 'U' category of [the] SCUGA" factors used to assess ***266** freshman applicants. *Ibid.* Section IV of the "U" category, entitled "Contribution to a Diverse Class," explained that "[t]he University is committed to a rich educational experience for its students. A diverse, as opposed to a homogenous, student population enhances the educational experience for all students. To insure a diverse class, significant weight will be given in the admissions process to indicators of students contribution to a diverse class." 1 *id.*, at 432. These indicators, used in evaluating freshman and transfer applicants alike, list being a member of an underrepresented minority group as establishing an applicant's contribution to diversity. See 3 *id.*, at 1133-1134, 1153-1154. Indeed, the *only* difference between the University's use of race in considering freshman and transfer applicants is that all underrepresented minority freshman applicants receive 20 points and "virtually" all who are minimally qualified are admitted, while "generally" all minimally qualified minority transfer applicants are admitted outright. While this difference might be relevant to a narrow tailoring analysis, it clearly has no effect on petitioners' standing to challenge the University's use of race in undergraduate admissions and its assertion that diversity is a compelling state interest that justifies its consideration of the race of its undergraduate applicants. [FN16]

> FN16. Because the University's guidelines concededly use race in evaluating both freshman and transfer applications, and because petitioners have challenged *any* use of race by the University in undergraduate admissions, the transfer admissions policy is very much before this Court. Although petitioners did not raise a narrow tailoring challenge to the transfer policy, as counsel for petitioners repeatedly explained, the transfer policy is before this Court in that petitioners challenged any use of race by the University to promote diversity, including through the transfer policy. See Tr. of Oral Arg. 4 ("[T]he [transfer] policy is essentially the same with respect to the consideration of race"); *id.*, at 5 ("The transfer policy considers race"); *id.*, at 6 (same); *id.*, at 7 ("[T]he transfer policy and the [freshman] admissions policy are fundamentally the same in the respect that they both consider race in the admissions process in a way that is discriminatory"); *id.*, at 7-8 ("[T]he University considers race for a purpose to achieve a diversity that we believe is not compelling, and if that is struck down as a rationale, then the [result] would be [the] same with respect to the transfer policy as with respect to the [freshman] admissions policy, Your Honor").

****2426 *267** Particularly instructive here is our statement in *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982), that "[i]f [defendant-employer] used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test *clearly* would satisfy the ... requirements of Rule 23(a)." *Id.*, at 159, n. 15, 102 S.Ct. 2364 (emphasis added). Here, the District Court found that the sole rationale the University had provided for any of its race-based preferences in undergraduate admissions was the interest in "the educational benefits that result from having a diverse student body." App. to Pet. for Cert. 8a. And petitioners argue that an interest in " diversity" is not a compelling state interest that is *ever* capable of justifying the use of race in undergraduate admissions. See, *e.g.*, Brief for Petitioners 11-13. In sum, the same set of concerns is implicated by the University's use of race in evaluating all undergraduate admissions applications under the guidelines. [FN17] We therefore agree with the District Court's ***268** carefully considered decision to certify this class-action challenge to the University's consideration of race in undergraduate admissions. See App. 67 (" 'It is a singular policy ... applied on a classwide basis' "); cf. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978) ("[T]he class determination generally involves considerations that are enmeshed

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in the factual and legal issues comprising the plaintiff's cause of action" (internal quotation marks omitted)). Indeed, class action treatment was particularly important in this case because "the claims of the individual students run the risk of becoming moot" and the "[t]he class action vehicle ... provides a mechanism for ensuring that a justiciable claim is before the Court." App. 69. Thus, we think it clear that Hamacher's personal stake, in view of both his past injury and the potential injury he faced at the time of certification, demonstrates that he may maintain this class-action challenge to the University's use of race in undergraduate admissions.

FN17. Indeed, as the litigation history of this case demonstrates, "the class-action device save[d] the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion." *Califano v. Yamasaki,* 442 U.S. 682, 701, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). This case was therefore quite unlike *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982), in which we found that the named representative, who had been passed over for a promotion, was not an adequate representative for absent class members who were never hired in the first instance. As we explained, the plaintiff's "evidentiary approaches to the individual and class claims were entirely different. He attempted to sustain his individual claim by proving intentional discrimination. He tried to prove the class claims through statistical evidence of disparate impact .... It is clear that the maintenance of respondent's action as a class action did not advance 'the efficiency and economy of litigation which is a principal purpose of the procedure.' " *Id.,* at 159, 102 S.Ct. 2364 (quoting *American Pipe & Constr. Co. v. Utah,* 414 U.S. 538, 553, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974)).

B

[5] Petitioners argue, first and foremost, that the University's use of race in undergraduate admissions violates the Fourteenth Amendment. Specifically, they contend that this Court has only sanctioned the use of racial classifications to remedy identified discrimination, a justification on which respondents have never relied. Brief for Petitioners 15-16. Petitioners further argue that "diversity as a basis for employing racial preferences is simply too open-ended, ill-defined, and indefinite to constitute a compelling interest capable of supporting narrowly-tailored means." *Id.,* at 17-18, 40- 41. But for the reasons set forth today in *Grutter v. Bollinger, ante,* at ---- - ----, 123 S.Ct., at 2338-2341, 2003 WL 21433492, the Court ****2427** has rejected these arguments of petitioners.

***269** Petitioners alternatively argue that even if the University's interest in diversity can constitute a compelling state interest, the District Court erroneously concluded that the University's use of race in its current freshman admissions policy is narrowly tailored to achieve such an interest. Petitioners argue that the guidelines the University began using in 1999 do not "remotely resemble the kind of consideration of race and ethnicity that Justice Powell endorsed in *Bakke.*" Brief for Petitioners 18. Respondents reply that the University's current admissions program *is* narrowly tailored and avoids the problems of the Medical School of the University of California at Davis program (U.C. Davis) rejected by Justice Powell. [FN18] They claim that their program "hews closely" to both the admissions program described by Justice Powell as well as the Harvard College admissions program that he endorsed. Brief for Respondents 32. Specifically, respondents contend that the LSA's policy provides the individualized consideration that "Justice Powell considered a hallmark of a constitutionally appropriate admissions program." *Id.,* at 35. For the reasons set out below, we do not agree.

FN18. U.C. Davis set aside 16 of the 100 seats available in its first year medical school program for "economically and/or educationally disadvantaged" applicants who were also members of designated "minority groups" as defined by the

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> university. "To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants." *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 274, 289, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (principal opinion). Justice Powell found that the program employed an impermissible two-track system that "disregard [ed] ... individual rights as guaranteed by the Fourteenth Amendment." *Id.,* at 315, 98 S.Ct. 2733. He reached this conclusion even though the university argued that "the reservation of a specified number of seats in each class for individuals from the preferred ethnic groups" was "the only effective means of serving the interest of diversity." *Ibid.* Justice Powell concluded that such arguments misunderstood the very nature of the diversity he found to be compelling. See *ibid.*

[6] ***270** It is by now well established that "all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized." *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 224, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). This " 'standard of review ... is not dependent on the race of those burdened or benefited by a particular classification.' " *Ibid.* (quoting *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 494, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (plurality opinion)). Thus, "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest of judicial scrutiny." *Adarand,* 515 U.S., at 224, 115 S.Ct. 2097.

[7] To withstand our strict scrutiny analysis, respondents must demonstrate that the University's use of race in its current admission program employs "narrowly tailored measures that further compelling governmental interests." *Id.,* at 227, 115 S.Ct. 2097. Because "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification," *Fullilove v. Klutznick,* 448 U.S. 448, 537, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980) (STEVENS, J., dissenting), our review of whether such requirements have been met must entail " 'a most searching examination.' " *Adarand, supra,* at 223, 115 S.Ct. 2097 (quoting *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 273, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (plurality opinion of Powell, J.)). We find that the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single "underrepresented minority" applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity ****2428** that respondents claim justifies their program.

In *Bakke,* Justice Powell reiterated that "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake." 438 U.S., at 307, 98 S.Ct. 2733. He then explained, however, that in his view it would be permissible for a university to employ an admissions program in which "race or ethnic background may be ***271** deemed a 'plus' in a particular applicant's file." *Id.,* at 317, 98 S.Ct. 2733. He explained that such a program might allow for "[t]he file of a particular black applicant [to] be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism." *Ibid.* Such a system, in Justice Powell's view, would be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant." *Ibid.*

Justice Powell's opinion in *Bakke* emphasized the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education. The admissions program Justice Powell described, however, did not contemplate that any single characteristic automatically ensured a specific and identifiable

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contribution to a university's diversity. See *id.*, at 315, 98 S.Ct. 2733. See also *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 618, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990) (O'CONNOR, J., dissenting) (concluding that the FCC's policy, which "embodie[d] the related notions that a particular applicant, by virtue of race or ethnicity alone, is more valued than other applicants because [the applicant is] 'likely to provide [a] distinct perspective,' " "impermissibly value[d] individuals" based on a presumption that "persons think in a manner associated with their race"). Instead, under the approach Justice Powell described, each characteristic of a particular applicant was to be considered in assessing the applicant's entire application.

The current LSA policy does not provide such individualized consideration. The LSA's policy automatically distributes 20 points to every single applicant from an "underrepresented minority" group, as defined by the University. The only consideration that accompanies this distribution of ***272** points is a factual review of an application to determine whether an individual is a member of one of these minority groups. Moreover, unlike Justice Powell's example, where the race of a "particular black applicant" could be considered without being decisive, see *Bakke*, 438 U.S., at 317, 98 S.Ct. 2733, the LSA's automatic distribution of 20 points has the effect of making "the factor of race ... decisive" for virtually every minimally qualified underrepresented minority applicant. *Ibid.* [FN19]

> FN19. Justice SOUTER recognizes that the LSA's use of race is decisive in practice, but he attempts to avoid that fact through unsupported speculation about the self-selection of minorities in the applicant pool. See *Post*, at 2436 (dissenting opinion).

Also instructive in our consideration of the LSA's system is the example provided in the description of the Harvard College Admissions Program, which Justice Powell both discussed in, and attached to, his opinion in *Bakke*. The example was included to "illustrate the kind of significance attached to race" under the Harvard College program. *Id.*, at 324, 98 S.Ct. 2733. It provided as follows:

> "The Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic ****2429** achievement was lower but who had demonstrated energy and leadership as well as an apparently abiding interest in black power. If a good number of black students much like A but few like B had already been admitted, the Committee might prefer B; and vice versa. If C, a white student with extraordinary artistic talent, were also seeking one of the remaining places, his unique quality might give him an edge over both A and B. Thus, the critical criteria are often individual qualities or experience *not dependent *273 upon race but sometimes associated with it.* " *Ibid.* (emphasis added).

This example further demonstrates the problematic nature of the LSA's admissions system. Even if student C's "extraordinary artistic talent" rivaled that of Monet or Picasso, the applicant would receive, at most, five points under the LSA's system. See App. 234-235. At the same time, every single underrepresented minority applicant, including students A and B, would automatically receive 20 points for submitting an application. Clearly, the LSA's system does not offer applicants the individualized selection process described in Harvard's example. Instead of considering how the differing backgrounds, experiences, and characteristics of students A, B, and C might benefit the University, admissions counselors reviewing LSA applications would simply award both A and B 20 points because their applications indicate that they are African-American, and student C would receive up to 5 points for his "extraordinary talent." [FN20]

> FN20. Justice SOUTER is therefore wrong when he contends that "applicants to the undergraduate college are [not] denied individualized consideration." *Post*, at 2441. As Justice O'CONNOR explains in her concurrence, the LSA's program "ensures that the diversity contributions of

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> applicants cannot be individually assessed." *Post,* at 2432.

Respondents emphasize the fact that the LSA has created the possibility of an applicant's file being flagged for individualized consideration by the ARC. We think that the flagging program only emphasizes the flaws of the University's system as a whole when compared to that described by Justice Powell. Again, students A, B, and C illustrate the point. First, student A would never be flagged. This is because, as the University has conceded, the effect of automatically awarding 20 points is that virtually every qualified underrepresented minority applicant is admitted. Student A, an applicant "with promise of superior academic performance," would certainly fit this description. Thus, the result of the automatic distribution of 20 points is that the University ***274** would never consider student A's individual background, experiences, and characteristics to assess his individual " potential contribution to diversity," *Bakke, supra,* at 317, 98 S.Ct. 2733. Instead, every applicant like student A would simply be admitted.

It is possible that students B and C would be flagged and considered as individuals. This assumes that student B was not already admitted because of the automatic 20-point distribution, and that student C could muster at least 70 additional points. But the fact that the "review committee can look at the applications individually and ignore the points," once an application is flagged, Tr. of Oral Arg. 42, is of little comfort under our strict scrutiny analysis. The record does not reveal precisely how many applications are flagged for this individualized consideration, but it is undisputed that such consideration is the exception and not the rule in the operation of the LSA's admissions program. See App. to Pet. for Cert. 117a ("The ARC reviews only a portion of all of the applications. The bulk of admissions decisions are executed based on selection index score parameters set by the EWG"). [FN21] ****2430** Additionally, this individualized review is only provided *after* admissions counselors automatically distribute the University's version of a "plus" that makes race a decisive factor for virtually every minimally qualified underrepresented minority applicant.

> FN21. Justice SOUTER is mistaken in his assertion that the Court "take[s] it upon itself to apply a newly formulated legal standard to an undeveloped record." *Post,* at 2442, n. 3. He ignores the fact that the respondents have told us all that is necessary to decide this case. As explained above, respondents concede that only a portion of the applications are reviewed by the ARC and that the "bulk of admissions decisions" are based on the point system. It should be readily apparent that the availability of this review, which comes *after* the automatic distribution of points, is far more limited than the individualized review given to the "large middle group of applicants" discussed by Justice Powell and described by the Harvard plan in *Bakke.* 438 U.S., at 316, 98 S.Ct. 2733 (internal quotation marks omitted).

***275** Respondents contend that "[t]he volume of applications and the presentation of applicant information make it impractical for [LSA] to use the ... admissions system" upheld by the Court today in *Grutter.* Brief for Respondents 6, n. 8. But the fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system. See *J.A. Croson Co.,* 488 U.S., at 508, 109 S.Ct. 706 (citing *Frontiero v. Richardson,* 411 U.S. 677, 690, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973) (plurality opinion of Brennan, J.) (rejecting " 'administrative convenience' " as a determinant of constitutionality in the face of a suspect classification)). Nothing in Justice Powell's opinion in *Bakke* signaled that a university may employ whatever means it desires to achieve the stated goal of diversity without regard to the limits imposed by our strict scrutiny analysis.

[8][9][10][11] We conclude, therefore, that because the University's use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents' asserted compelling interest in diversity, the admissions policy violates the Equal Protection Clause of the Fourteenth Amendment. [FN22] We further find that the

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admissions policy also violates Title VI and *276 42 U.S.C. § 1981. [FN23] Accordingly, we reverse **2431 that portion of the District Court's decision granting respondents summary judgment with respect to liability and remand the case for proceedings consistent with this opinion.

FN22. Justice GINSBURG in her dissent observes that "[o]ne can reasonably anticipate ... that colleges and universities will seek to maintain their minority enrollment ... whether or not they can do so in full candor through adoption of affirmative action plans of the kind here at issue." *Post,* at 2446. She goes on to say that "[i]f honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises." *Ibid.* These observations are remarkable for two reasons. First, they suggest that universities--to whose academic judgment we are told in *Grutter v. Bollinger, ante,* at ----, 123 S.Ct., at 2339, 2003 WL 21433492, we should defer--will pursue their affirmative-action programs whether or not they violate the United States Constitution. Second, they recommend that these violations should be dealt with, not by requiring the universities to obey the Constitution, but by changing the Constitution so that it conforms to the conduct of the universities.

FN23. We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI. See *Alexander v. Sandoval,* 532 U.S. 275, 281, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001); *United States v. Fordice,* 505 U.S. 717, 732, n. 7, 112 S.Ct. 2727, 120 L.Ed.2d 575 (1992); *Alexander v. Choate,* 469 U.S. 287, 293, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985). Likewise, with respect to § 1981, we have explained that the provision was "meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race." *McDonald v. Santa Fe Trail Transp. Co.,* 427 U.S. 273, 295-296, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976). Furthermore, we have explained that a contract for educational services is a "contract" for purposes of § 1981. See *Runyon v. McCrary,* 427 U.S. 160, 172, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976). Finally, purposeful discrimination that violates the Equal Protection Clause of the Fourteenth Amendment will also violate § 1981. See *General Building Contractors Assn., Inc. v. Pennsylvania,* 458 U.S. 375, 389-390, 102 S.Ct. 3141, 73 L.Ed.2d 835 (1982).

It is so ordered.

Justice O'CONNOR, concurring. [FN*]

FN* Justice BREYER joins this opinion, except for the last sentence.

I

Unlike the law school admissions policy the Court upholds today in *Grutter v. Bollinger, ante,* 2325, 123 S.Ct. 2331, 2003 WL 21433492, the procedures employed by the University of Michigan's (University) Office of Undergraduate Admissions do not provide for a meaningful individualized review of applicants. Cf. *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (principal opinion of Powell, J.). The law school considers the various diversity qualifications of each applicant, including race, on a case-by-case basis. See *Grutter v. Bollinger, ante,* at ----, 123 S.Ct., at 2343, 2003 WL 21433492. By contrast, the Office of Undergraduate Admissions relies on the selection index to assign *every* underrepresented minority applicant the same, *automatic* 20-point bonus without consideration of the particular background, experiences, or *277 qualities of each individual applicant. Cf. *ante,* at 2428, 2429. And this mechanized selection index score, by and large,

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automatically determines the admissions decision for each applicant. The selection index thus precludes admissions counselors from conducting the type of individualized consideration the Court's opinion in *Grutter, supra,* at ----, 123 S.Ct., at 2343-2344, 2003 WL 21433492, requires: consideration of each applicant's individualized qualifications, including the contribution each individual's race or ethnic identity will make to the diversity of the student body, taking into account diversity within and among all racial and ethnic groups. Cf. *ante,* at 2428-2429 (citing *Bakke, supra,* at 324, 98 S.Ct. 2733).

On cross-motions for summary judgment, the District Court held that the admissions policy the University instituted in 1999 and continues to use today passed constitutional muster. See 122 F.Supp.2d 811, 827 (E.D.Mich.2000). In their proposed summary of undisputed facts, the parties jointly stipulated to the admission policy's mechanics. App. to Pet. for Cert. 116a-118a. When the university receives an application for admission to its incoming class, an admissions counselor turns to a Selection Index Worksheet to calculate the applicant's selection index score out of 150 maximum possible points--a procedure the University began using in 1998. App. 256. Applicants with a score of over 100 are automatically admitted; applicants with scores of 95 to 99 are categorized as "admit or postpone"; applicants with 90-94 points are postponed or admitted; applicants with 75-89 points are delayed or postponed; and applicants with 74 points or fewer are delayed or rejected. The Office of Undergraduate Admissions extends offers of admission on a rolling basis and acts upon the applications it has received through periodic "[m]ass [a]ction [s]." App. 256.

In calculating an applicant's selection index score, counselors assign numerical values to a broad range of academic factors, as well as to other variables the University considers important to assembling a diverse student body, including race. Up to 110 points can be assigned for academic performance, ***278** and up to 40 points can be assigned for the other, nonacademic factors. Michigan residents, for example, receive 10 points, and children of alumni receive 4. Counselors may assign an outstanding essay up to 3 points and may award up to 5 points for an applicant's personal achievement, leadership, or public service. Most importantly for this case, an applicant automatically receives a 20 point bonus if he or she possesses any one of the following "miscellaneous" factors: membership ****2432** in an underrepresented minority group; attendance at a predominantly minority or disadvantaged high school; or recruitment for athletics.

In 1999, the University added another layer of review to its admissions process. After an admissions counselor has tabulated an applicant's selection index score, he or she may "flag" an application for further consideration by an Admissions Review Committee, which is composed of members of the Office of Undergraduate Admissions and the Office of the Provost. App. to Pet. for Cert. 117a. The review committee meets periodically to discuss the files of "flagged" applicants not already admitted based on the selection index parameters. App. 275. After discussing each flagged application, the committee decides whether to admit, defer, or deny the applicant. *Ibid.*

Counselors may flag an applicant for review by the committee if he or she is academically prepared, has a selection index score of at least 75 (for non-Michigan residents) or 80 (for Michigan residents), and possesses one of several qualities valued by the University. These qualities include "high class rank, unique life experiences, challenges, circumstances, interests or talents, socioeconomic disadvantage, and under-represented race, ethnicity, or geography." App. to Pet. for Cert. 117a. Counselors also have the discretion to flag an application if, notwithstanding a high selection index score, something in the applicant's file suggests that the applicant may not be suitable for admission. App. 274. Finally, in "rare circumstances," an admissions counselor ***279** may flag an applicant with a selection index score below the designated levels if the counselor has reason to believe from reading the entire file that the score does not reflect the applicant's true promise. *Ibid.*

II

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Although the Office of Undergraduate Admissions does assign 20 points to some "soft" variables other than race, the points available for other diversity contributions, such as leadership and service, personal achievement, and geographic diversity, are capped at much lower levels. Even the most outstanding national high school leader could never receive more than five points for his or her accomplishments--a mere quarter of the points automatically assigned to an underrepresented minority solely based on the fact of his or her race. Of course, as Justice Powell made clear in *Bakke,* a university need not "necessarily accor[d]" all diversity factors "the same weight," 438 U.S., at 317, 98 S.Ct. 2733, and the "weight attributed to a particular quality may vary from year to year depending on the 'mix' both of the student body and the applicants for the incoming class," *id.,* at 317-318, 98 S.Ct. 2733. But the selection index, by setting up automatic, predetermined point allocations for the soft variables, ensures that the diversity contributions of applicants cannot be individually assessed. This policy stands in sharp contrast to the law school's admissions plan, which enables admissions officers to make nuanced judgments with respect to the contributions each applicant is likely to make to the diversity of the incoming class. See *Grutter v. Bollinger, ante,* at ----, 123 S.Ct., at 2342, 2003 WL 21433492 ("[T]he Law School's race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions").

The only potential source of individualized consideration appears to be the Admissions Review Committee. The evidence in the record, however, reveals very little about how ***280** the review committee actually functions. And what evidence there is indicates that the committee is a kind of afterthought, rather than an integral component of a system of individualized review. As the Court points out, it is undisputed that the " '[committee] reviews only a portion of all the applications. The bulk ****2433** of admissions decisions are executed based on selection index score parameters set by the [Enrollment Working Group].' " *Ante,* at 2429 (quoting App. to Pet for Cert. 117a). Review by the committee thus represents a necessarily limited exception to the Office of Undergraduate Admissions' general reliance on the selection index. Indeed, the record does not reveal how many applications admissions counselors send to the review committee each year, and the University has not pointed to evidence demonstrating that a meaningful percentage of applicants receives this level of discretionary review. In addition, eligibility for consideration by the committee is itself based on automatic cut-off levels determined with reference to selection index scores. And there is no evidence of how the decisions are actually made--what type of individualized consideration is or is not used. Given these circumstances, the addition of the Admissions Review Committee to the admissions process cannot offset the apparent absence of individualized consideration from the Office of Undergraduate Admissions' general practices.

For these reasons, the record before us does not support the conclusion that the University of Michigan's admissions program for its College of Literature, Science, and the Arts--to the extent that it considers race--provides the necessary individualized consideration. The University, of course, remains free to modify its system so that it does so. Cf. *Grutter v. Bollinger, ante,* 2325, 123 S.Ct., at 2331, 2003 WL 21433492. But the current system, as I understand it, is a nonindividualized, mechanical one. As a result, I join the Court's opinion reversing the decision of the District Court.

***281** Justice THOMAS, concurring.

I join the Court's opinion because I believe it correctly applies our precedents, including today's decision in *Grutter v. Bollinger, ante,* 2325, 123 S.Ct., at 2350, 2003 WL 21433492. For similar reasons to those given in my separate opinion in that case, see *ante,* 2325, 123 S.Ct., at 2350, 2003 WL 21433492 (opinion concurring in part and dissenting in part), however, I would hold that a State's use of racial discrimination in higher education admissions is categorically prohibited by the Equal Protection Clause.

I make only one further observation. The University of Michigan's College of Literature,

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Science, and the Arts (LSA) admissions policy that the Court today invalidates does not suffer from the additional constitutional defect of allowing racial "discriminat[ion] among [the] groups" included within its definition of underrepresented minorities, *Grutter, ante,* at ----, 123 S.Ct., at 2343, 2003 WL 21433492 (opinion of the Court); *post,* at 2363 (THOMAS, J., concurring in part and dissenting in part), because it awards all underrepresented minorities the same racial preference. The LSA policy falls, however, because it does not sufficiently allow for the consideration of nonracial distinctions among underrepresented minority applicants. Under today's decisions, a university may not racially discriminate between the groups constituting the critical mass. See *ibid.; Grutter, ante,* at ----, 123 S.Ct., at 2339, 2003 WL 21433492 (opinion of the Court) (stating that such "racial balancing ... is patently unconstitutional"). An admissions policy, however, must allow for consideration of these nonracial distinctions among applicants on both sides of the single permitted racial classification. See *ante,* at 2428-2429 (opinion of the Court); *ante,* at 2431 (O'CONNOR, J., concurring).

Justice BREYER, concurring in the judgment.

I concur in the judgment of the Court though I do not join its opinion. I join Justice O'CONNOR'S opinion except insofar as it joins that of the Court. I join Part I of Justice GINSBURG'S dissenting opinion, but I do not dissent from the ***282** Court's reversal of the District Court's ****2434** decision. I agree with Justice GINSBURG that, in implementing the Constitution's equality instruction, government decisionmakers may properly distinguish between policies of inclusion and exclusion, *post,* at 2444, for the former are more likely to prove consistent with the basic constitutional obligation that the law respect each individual equally, see U.S. Const., Amdt. 14.

Justice STEVENS, with whom Justice SOUTER joins, dissenting.

Petitioners seek forward-looking relief enjoining the University of Michigan from continuing to use its current race-conscious freshman admissions policy. Yet unlike the plaintiff in *Grutter v. Bollinger, ante,* 2325, 123 S.Ct., at 2331, 2003 WL 21433492, [FN1] the petitioners in this case had already enrolled at other schools before they filed their class-action complaint in this case. Neither petitioner was in the process of reapplying to Michigan through the freshman admissions process at the time this suit was filed, and neither has done so since. There is a total absence of evidence that either petitioner would receive any benefit from the prospective relief sought by their lawyer. While some unidentified members of the class may very well have standing to seek prospective relief, it is clear that neither petitioner does. Our precedents therefore require dismissal of the action.

FN1. In challenging the use of race in admissions at Michigan's law school, Barbara Grutter alleged in her complaint that she "has not attended any other law school" and that she "still desires to attend the Law School and become a lawyer." App. in No. 02-241, p. 30.

I

Petitioner Jennifer Gratz applied in 1994 for admission to the University of Michigan's (University) College of Literature, Science, and the Arts (LSA) as an undergraduate for the 1995-1996 freshman class. After the University delayed action on her application and then placed her name on an extended waiting list, Gratz decided to attend the University of Michigan at Dearborn instead; she graduated in 1999. ***283** Petitioner Patrick Hamacher applied for admission to LSA as an undergraduate for the 1997-1998 freshman class. After the University postponed decision on his application and then placed his name on an extended waiting list, he attended Michigan State University, graduating in 2001. In the complaint that petitioners filed on October 14, 1997, Hamacher alleged that "[h]e intends to apply to transfer [to the University of Michigan] if the discriminatory admissions system described herein is eliminated." App. 34.

At the class certification stage, petitioners sought to have Hamacher represent a class pursuant to

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Federal Rule Civil Procedure 23(b)(2). [FN2] See App. 71, n. 3. In response, Michigan contended that "Hamacher lacks standing to represent a class seeking declaratory and injunctive relief." *Id.*, at 63. Michigan submitted that Hamacher suffered " ' no threat of imminent future injury' " given that he had already enrolled at another undergraduate institution. [FN3] *Id.*, at 64. The District Court rejected Michigan's contention, concluding that Hamacher had standing to seek injunctive relief because the complaint alleged that he intended to apply to Michigan as a transfer student. See *id.*, at 67 ("To the extent that plaintiff Hamacher reapplies to the University of Michigan, he will again face the same 'harm' in that race will continue to be a factor in admissions"). ****2435** The District Court, accordingly, certified Hamacher as the sole class representative and limited the claims of the class to injunctive and declaratory relief. See *id.*, at 70-71.

> FN2. Petitioners did not seek to have Gratz represent the class pursuant to Federal Rule Civil Procedure 23(b)(2). See App. 71, n. 3.

> FN3. In arguing that Hamacher lacked standing, Michigan also asserted that Hamacher "would need to achieve a 3.0 grade point average to attempt to transfer to the University of Michigan." *Id.*, at 64, n. 2. The District Court rejected this argument, concluding that "Hamacher's present grades are not a factor to be considered at this time." *Id.*, at 67.

In subsequent proceedings, the District Court held that the 1995-1998 admissions system, which was in effect when both petitioners' applications were denied, was unlawful but ***284** that Michigan's new 1999-2000 admissions system was lawful. When petitioners sought certiorari from this Court, Michigan did not cross-petition for review of the District Court's judgment concerning the admissions policies that Michigan had in place when Gratz and Hamacher applied for admission in 1994 and 1996 respectively. See Brief for Respondents 5, n. 7. Accordingly, we have before us only that portion of the District Court's judgment that upheld Michigan's new freshman admissions policy.

II

Both Hamacher and Gratz, of course, have standing to seek damages as compensation for the alleged wrongful denial of their respective applications under Michigan's old freshman admissions system. However, like the plaintiff in *Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) , who had standing to recover damages caused by "chokeholds" administered by the police in the past but had no standing to seek injunctive relief preventing future chokeholds, petitioners' past injuries do not give them standing to obtain injunctive relief to protect third parties from similar harms. See *id.*, at 102, 103 S.Ct. 1660 ("[P]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects" (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495-496, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974))). To seek forward-looking, injunctive relief, petitioners must show that they face an imminent threat of future injury. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 210-211, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). This they cannot do given that when this suit was filed, neither faced an impending threat of future injury based on Michigan's new freshman admissions policy. [FN4]

> FN4. In responding to questions about petitioners' standing at oral argument, petitioners' counsel alluded to the fact that Michigan might continually change the details of its admissions policy. See Tr. of Oral Arg. 9. The change in Michigan's freshman admissions policy, however, is not the reason why petitioners cannot establish standing to seek prospective relief. Rather, the reason they lack standing to seek forward-looking relief is that when this suit was filed, neither faced a "real and immediate threat" of future injury under Michigan's freshman admissions policy given that they had both already enrolled at other institutions. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 210, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (quoting *Los Angeles*

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> *v. Lyons,* 461 U.S. 95, 105, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983)). Their decision to obtain a college education elsewhere distinguishes this case from Allan Bakke's single-minded pursuit of a medical education from the University of California at Davis. See *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978); cf. *DeFunis v. Odegaard,* 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974) *(per curiam).*

285** Even though there is not a scintilla of evidence that the freshman admissions program now being administered by respondents will ever have any impact on either Hamacher or Gratz, petitioners nonetheless argue that Hamacher has a personal stake in this suit because at the time the complaint was filed, Hamacher intended to apply to transfer to Michigan once certain admission policy changes occurred. [FN5] See App. 34; see also Tr. of Oral ****2436** Arg. 4-5. Petitioners' attempt to base Hamacher's standing in this suit on a hypothetical transfer application fails for several reasons. First, there is no evidence that Hamacher ever actually applied for admission as a transfer student at Michigan. His claim of future injury is at best "conjectural or hypothetical" rather than "real and immediate." *O'Shea v. Littleton,* 414 U.S., at 494, 94 S.Ct. 669286** (internal quotation marks omitted); see also *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

> FN5. Hamacher clearly can no longer claim an intent to transfer into Michigan's undergraduate program given that he graduated from college in 2001. However, this fact alone is not necessarily fatal to the instant class action because we have recognized that, if a named class representative has standing at the time a suit is initiated, class actions may proceed in some instances following mootness of the named class representative's claim. See, *e.g., Sosna v. Iowa,* 419 U.S. 393, 402, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975) (holding that the requisite Article III "case or controversy" may exist "between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot"); *Franks v. Bowman Transp. Co.,* 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976). The problem in this case is that neither Gratz nor Hamacher had standing to assert a forward-looking, injunctive claim in federal court at the time this suit was initiated.

Second, as petitioners' counsel conceded at oral argument, the transfer policy is not before this Court and was not addressed by the District Court. See Tr. of Oral Arg. 4-5 (admitting that "[t]he transfer admissions policy itself is not before you--the Court"). Unlike the University's freshman policy, which is detailed at great length in the Joint Appendix filed with this Court, the specifics of the transfer policy are conspicuously missing from the Joint Appendix filed with this Court. Furthermore, the transfer policy is not discussed anywhere in the parties' briefs. Nor is it ever even referenced in the District Court's Dec. 13, 2000, opinion that upheld Michigan's new freshman admissions policy and struck down Michigan's old policy. Nonetheless, evidence filed with the District Court by Michigan demonstrates that the criteria used to evaluate transfer applications at Michigan differ significantly from the criteria used to evaluate freshman undergraduate applications. Of special significance, Michigan's 2000 freshman admissions policy, for example, provides for 20 points to be added to the selection index scores of minority applicants. See *ante,* at 2428. In contrast, Michigan does not use points in its transfer policy; some applicants, including minority and socioeconomically disadvantaged applicants, "will generally be admitted" if they possess certain qualifications, including a 2.5 undergraduate grade point average (GPA), sophomore standing, and a 3.0 high school GPA. 10 Record 16 (Exh. C). Because of these differences, Hamacher cannot base his right to complain about the *freshman* admissions policy on his hypothetical injury under a wholly separate *transfer* policy. For "[i]f the right to complain of *one* administrative deficiency automatically

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conferred the right to complain of *all* administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review." ***287** *Lewis v. Casey,* 518 U.S. 343, 358-359, n. 6, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) (emphasis in original); see also *Blum v. Yaretsky,* 457 U.S. 991, 999, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982) ("[A] plaintiff who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar"). [FN6]

> FN6. Under the majority's view of standing, there would be no end to Hamacher's ability to challenge any use of race by the University in a variety of programs. For if Hamacher's right to complain about the *transfer* policy gives him standing to challenge the *freshman* policy, presumably his ability to complain about the *transfer* policy likewise would enable him to challenge Michigan's *law school* admissions policy, as well as any other race-based admissions policy used by Michigan.

Third, the differences between the freshman and the transfer admissions policies make it extremely unlikely, at best, that an injunction requiring respondents to modify the freshman admissions program would have any impact on Michigan's transfer policy. See ***2437***Allen v. Wright,* 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) ("[R]elief from the injury must be 'likely' to follow from a favorable decision"); *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 222, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974) ("[T]he discrete factual context within which the concrete injury occurred or is threatened insures the framing of relief no broader than required by the precise facts to which the court's ruling would be applied"). This is especially true in light of petitioners' unequivocal disavowal of any request for equitable relief that would totally preclude the use of race in the processing of all admissions applications. See Tr. of Oral Arg. 14-15.

The majority asserts that petitioners "have challenged *any* use of race by the University in undergraduate admissions"--freshman and transfer alike. *Ante,* at 2425, n. 16 (emphasis in original). Yet when questioned at oral argument about whether petitioners' challenge would impact both private and public universities, petitioners' counsel stated: "Your Honor, I want to be clear about what it is that we're arguing for here today. *We are not suggesting an absolute* ***288** *rule forbidding any use of race under any circumstances.* What we are arguing is that the interest asserted here by the University, this amorphous, ill-defined, unlimited interest in diversity is not a compelling interest." Tr. of Oral Arg. 14 (emphasis added). In addition, when asked whether petitioners took the position that the only permissible use of race is as a remedy for past discrimination, petitioners' lawyer stated: "I would not go that far.... [T]here may be other reasons. I think they would have to be extraordinary and rare ... ." *Id.,* at 15. Consistent with these statements, petitioners' briefs filed with this Court attack the University's asserted interest in "diversity" but acknowledge that race could be considered for remedial reasons. See, *e.g.,* Brief for Petitioners 16-17.

Because Michigan's transfer policy was not challenged by petitioners and is not before this Court, see *supra,* at 2436, we do not know whether Michigan would defend its transfer policy on diversity grounds, or whether it might try to justify its transfer policy on other grounds, such as a remedial interest. Petitioners' counsel was therefore incorrect in asserting at oral argument that if the University's asserted interest in "diversity" were to be "struck down as a rationale, then the law would be [the] same with respect to the transfer policy as with respect to the original [freshman admissions] policy." Tr. of Oral Arg. 7-8. And the majority is likewise mistaken in assuming that "the University's use of race in undergraduate transfer admissions does not implicate a significantly different set of concerns than does its use of race in undergraduate freshman admissions." *Ante,* at 2424. Because the transfer policy has never been the subject of this suit, we simply do not know (1) whether Michigan would defend its transfer policy on "diversity" grounds or some other grounds, or (2) how the absence of a point system in the transfer policy

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might impact a narrow tailoring analysis of that policy.

***289** At bottom, petitioners' interest in obtaining an injunction for the benefit of younger third parties is comparable to that of the unemancipated minor who had no standing to litigate on behalf of older women in *H.L. v. Matheson,* 450 U.S. 398, 406-407, 101 S.Ct. 1164, 67 L.Ed.2d 388 (1981), or that of the Medicaid patients transferred to less intensive care who had no standing to litigate on behalf of patients objecting to transfers to more intensive care facilities in *Blum v. Yaretsky,* 457 U.S., at 1001, 102 S.Ct. 2777. To have standing, it is elementary that the petitioners' own interests must be implicated. Because neither petitioner has a personal stake in this suit for prospective relief, neither has standing.

III

It is true that the petitioners' complaint was filed as a class action and that Hamacher ****2438** has been certified as the representative of a class, some of whose members may well have standing to challenge the LSA freshman admissions program that is presently in effect. But the fact that "a suit may be a class action ... adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.' " *Simon v. Eastern Ky. Welfare Rights Organization,* 426 U.S. 26, 40, n. 20, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976) (quoting *Warth v. Seldin,* 422 U.S. 490, 502, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)); see also 1 A. Conte & H. Newberg, Class Actions § 2:5 (4th ed. 2002) ("[O]ne cannot acquire individual standing by virtue of bringing a class action"). [FN7] Thus, in *Blum,* we squarely held that the interests of members of the class could not satisfy the requirement that the class representatives have a personal interest in obtaining the particular equitable relief being sought. The class in ***290** *Blum* included patients who wanted a hearing before being transferred to facilities where they would receive more intensive care. The class representatives, however, were in the category of patients threatened with a transfer to less intensive care facilities. In explaining why the named class representatives could not base their standing to sue on the injury suffered by other members of the class, we stated:

> FN7. Of course, the injury to Hamacher would give him standing to claim damages for past harm on behalf of class members, but he was certified as the class representative for the limited purpose of seeking injunctive and declaratory relief.

> "Respondents suggest that members of the class they represent have been transferred to higher levels of care as a result of [utilization review committee] decisions. Respondents, however, 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.' *Warth v. Seldin,* 422 U.S. 490, 502[, 95 S.Ct. 2197, 45 L.Ed.2d 343] (1975). Unless these individuals 'can thus demonstrate the requisite case or controversy between themselves personally and [petitioners], "none may seek relief on behalf of himself or any other member of the class." *O'Shea v. Littleton,* 414 U.S. 488, 494[, 94 S.Ct. 669, 38 L.Ed.2d 674] (1974).' *Ibid.* " 457 U.S., at 1001, n. 13, 102 S.Ct. 2777.

Much like the class representatives in *Blum,* Hamacher--the sole class representative in this case--cannot meet Article III's threshold personal-stake requirement. While unidentified members of the class he represents may well have standing to challenge Michigan's current freshman admissions policy, Hamacher cannot base his standing to sue on injuries suffered by other members of the class.

IV

As this case comes to us, our precedents leave us no alternative but to dismiss the writ for lack of jurisdiction. Neither petitioner has a personal stake in the outcome of the case, and neither has standing to seek prospective relief on behalf of unidentified class members who may or may not ***291** have

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standing to litigate on behalf of themselves. Accordingly, I respectfully dissent.

Justice SOUTER, with whom Justice GINSBURG joins as to Part II, dissenting.

I agree with Justice STEVENS that Patrick Hamacher has no standing to seek declaratory or injunctive relief against a freshman admissions policy that will never cause him any harm. I write separately to note that even the Court's new gloss on the law of standing should not permit it to reach the issue it decides today. And because a majority of the Court has chosen to address the merits, I also add a word to say that even if the merits were reachable, ****2439** I would dissent from the Court's judgment.

I

The Court's finding of Article III standing rests on two propositions: first, that both the University of Michigan's undergraduate college's transfer policy and its freshman admissions policy seek to achieve student body diversity through the "use of race," *ante,* at 2422-2426, and second, that Hamacher has standing to challenge the transfer policy on the grounds that diversity can never be a "compelling state interest" justifying the use of race in any admissions decision, freshman or transfer, *ante,* at 2425. The Court concludes that, because Hamacher's argument, if successful, would seal the fate of both policies, his standing to challenge the transfer policy also allows him to attack the freshman admissions policy. *Ibid.,* n. 16 ("[P]etitioners challenged any use of race by the University to promote diversity, including through the transfer policy"); *ibid.* (" '[T]he University considers race for a purpose to achieve a diversity that we believe is not compelling, and if that is struck down as a rationale, then the [result] would be [the] same with respect to the transfer policy as with respect to the [freshman] admissions policy, Your Honor' " (quoting Tr. of Oral Arg. 7-8)). I agree with Justice STEVENS's critique ***292** that the Court thus ignores the basic principle of Article III standing that a plaintiff cannot challenge a government program that does not apply to him. See *ante,* at 2436, and n. 6 (dissenting opinion). [FN1]

FN1. The Court's holding arguably exposes a weakness in the rule of *Blum v. Yaretsky,* 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982), that Article III standing may not be satisfied by the unnamed members of a duly certified class. But no party has invited us to reconsider *Blum,* and I follow Justice STEVENS in approaching the case on the assumption that *Blum* is settled law.

But even on the Court's indulgent standing theory, the decision should not go beyond a recognition that diversity can serve as a compelling state interest justifying race-conscious decisions in education. *Ante,* at 2426-2427 (citing *Grutter v. Bollinger, ante,* at ---- - ----, 123 S.Ct., at 2338-2341, 2003 WL 21433492). Since, as the Court says, "petitioners did not raise a narrow tailoring challenge to the transfer policy," *ante,* at 2425, n. 16, our decision in *Grutter* is fatal to Hamacher's sole attack upon the transfer policy, which is the only policy before this Court that he claims aggrieved him. Hamacher's challenge to that policy having failed, his standing is presumably spent. The further question whether the freshman admissions plan is narrowly tailored to achieving student body diversity remains legally irrelevant to Hamacher and should await a plaintiff who is actually hurt by it. [FN2]

FN2. For that matter, as the Court suggests, narrow tailoring challenges against the two policies could well have different outcomes. *Ante,* at 2425. The record on the decisionmaking process for transfer applicants is understandably thin, given that petitioners never raised a narrow tailoring challenge against it. Most importantly, however, the transfer policy does not use a points-based "selection index" to evaluate transfer applicants, but rather considers race as one of many factors in making the general determination whether the applicant would make a " 'contribution to a diverse student body.' " *Ante,* at 2425 (quoting 2 App. in

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> No. 01-1333 etc. (CA6), p. 531 (capitalization omitted)). This limited glimpse into the transfer policy at least permits the inference that the University engages in a "holistic review" of transfer applications consistent with the program upheld today in *Grutter v. Bollinger, ante,* at ----, 123 S.Ct., at 2343-2344, 2003 WL 21433492.

***293** II

The cases now contain two pointers toward the line between the valid and the unconstitutional in race-conscious admissions schemes. *Grutter* reaffirms the permissibility of individualized consideration of race to achieve a diversity of students, at least where race is not assigned a preordained value in all cases. On the other hand, Justice Powell's opinion in ****2440***Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), rules out a racial quota or set-aside, in which race is the sole fact of eligibility for certain places in a class. Although the freshman admissions system here is subject to argument on the merits, I think it is closer to what *Grutter* approves than to what *Bakke* condemns, and should not be held unconstitutional on the current record.

The record does not describe a system with a quota like the one struck down in *Bakke,* which "insulate[d]" all nonminority candidates from competition from certain seats. *Bakke, supra,* at 317, 98 S.Ct. 2733 (opinion of Powell, J.); see also *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 496, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (plurality opinion) (stating that *Bakke* invalidated "a plan that completely eliminated nonminorities from consideration for a specified percentage of opportunities"). The *Bakke* plan "focused *solely* on ethnic diversity" and effectively told nonminority applicants that "[n]o matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the [set-aside] special admissions seats." *Bakke, supra,* at 315, 319, 98 S.Ct. 2733 (opinion of Powell, J.) (emphasis in original).

The plan here, in contrast, lets all applicants compete for all places and values an applicant's offering for any place not only on grounds of race, but on grades, test scores, strength of high school, quality of course of study, residence, alumni relationships, leadership, personal character, socioeconomic ***294** disadvantage, athletic ability, and quality of a personal essay. *Ante,* at 2419-2420. A nonminority applicant who scores highly in these other categories can readily garner a selection index exceeding that of a minority applicant who gets the 20-point bonus. Cf. *Johnson v. Transportation Agency, Santa Clara Cty.,* 480 U.S. 616, 638, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987) (upholding a program in which gender "was but one of numerous factors [taken] into account in arriving at [a] decision" because "[n]o persons are automatically excluded from consideration; all are able to have their qualifications weighed against those of other applicants" (emphasis deleted)).

Subject to one qualification to be taken up below, this scheme of considering, through the selection index system, all of the characteristics that the college thinks relevant to student diversity for every one of the student places to be filled fits Justice Powell's description of a constitutionally acceptable program: one that considers "all pertinent elements of diversity in light of the particular qualifications of each applicant" and places each element "on the same footing for consideration, although not necessarily according them the same weight." *Bakke, supra,* at 317, 98 S.Ct. 2733. In the Court's own words, "each characteristic of a particular applicant [is] considered in assessing the applicant's entire application." *Ante,* at 2428. An unsuccessful nonminority applicant cannot complain that he was rejected "simply because he was not the right color"; an applicant who is rejected because "his combined qualifications ... did not outweigh those of the other applicant" has been given an opportunity to compete with all other applicants. *Bakke, supra,* at 318, 98 S.Ct. 2733 (opinion of Powell, J.).

The one qualification to this description of the admissions process is that membership in an

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underrepresented minority is given a weight of 20 points on the 150-point scale. On the face of things, however, this assignment of specific points does not set race apart from all other weighted considerations. Nonminority students may receive 20 points for athletic ability, socioeconomic disadvantage, attendance at a socioeconomically ***295** disadvantaged or predominantly minority high school, or at the Provost's discretion; they may also receive 10 points for being residents of Michigan, ****2441** 6 for residence in an underrepresented Michigan county, 5 for leadership and service, and so on.

The Court nonetheless finds fault with a scheme that "automatically" distributes 20 points to minority applicants because "[t]he only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups." *Ante,* at 2428. The objection goes to the use of points to quantify and compare characteristics, or to the number of points awarded due to race, but on either reading the objection is mistaken.

The very nature of a college's permissible practice of awarding value to racial diversity means that race must be considered in a way that increases some applicants' chances for admission. Since college admission is not left entirely to inarticulate intuition, it is hard to see what is inappropriate in assigning some stated value to a relevant characteristic, whether it be reasoning ability, writing style, running speed, or minority race. Justice Powell's plus factors necessarily are assigned some values. The college simply does by a numbered scale what the law school accomplishes in its "holistic review," *Grutter, ante,* at ----, 123 S.Ct., at 2343, 2003 WL 21433492; the distinction does not imply that applicants to the undergraduate college are denied individualized consideration or a fair chance to compete on the basis of all the various merits their applications may disclose.

Nor is it possible to say that the 20 points convert race into a decisive factor comparable to reserving minority places as in *Bakke.* Of course we can conceive of a point system in which the "plus" factor given to minority applicants would be so extreme as to guarantee every minority applicant a higher rank than every nonminority applicant in the university's admissions system, see 438 U.S., at 319, n. 53, 98 S.Ct. 2733 (opinion of Powell, J.). But petitioners do not have a convincing argument ***296** that the freshman admissions system operates this way. The present record obviously shows that nonminority applicants may achieve higher selection point totals than minority applicants owing to characteristics other than race, and the fact that the university admits "virtually every qualified under-represented minority applicant," App. to Pet. for Cert. 111a, may reflect nothing more than the likelihood that very few qualified minority applicants apply, Brief for Respondents Bollinger et al. 39, as well as the possibility that self-selection results in a strong minority applicant pool. It suffices for me, as it did for the District Court, that there are no *Bakke*-like set-asides and that consideration of an applicant's whole spectrum of ability is no more ruled out by giving 20 points for race than by giving the same points for athletic ability or socioeconomic disadvantage.

Any argument that the "tailoring" amounts to a set-aside, then, boils down to the claim that a plus factor of 20 points makes some observers suspicious, where a factor of 10 points might not. But suspicion does not carry petitioners' ultimate burden of persuasion in this constitutional challenge, *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 287-288, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (plurality opinion of Powell, J.), and it surely does not warrant condemning the college's admissions scheme on this record. Because the District Court (correctly, in my view) did not believe that the specific point assignment was constitutionally troubling, it made only limited and general findings on other characteristics of the university's admissions practice, such as the conduct of individualized review by the Admissions Review Committee. 122 F.Supp.2d 811, 829-830 (E.D.Mich.2000). As the Court indicates, we know very little about the actual role of the review committee. *Ante,* at 2429 ("The record does not reveal precisely how many applications are flagged for this individualized ****2442** consideration [by the committee]"); see also *ante,* at 2432 (O'CONNOR,

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J., concurring) ("The evidence in the record ... reveals very little about how the review committee actually functions"). The point system cannot operate as a *de facto* set-aside if the ***297** greater admissions process, including review by the committee, results in individualized review sufficient to meet the Court's standards. Since the record is quiet, if not silent, on the case-by-case work of the committee, the Court would be on more defensible ground by vacating and remanding for evidence about the committee's specific determinations. [FN3]

> FN3. The Court surmises that the committee does not contribute meaningfully to the University's individualized review of applications. *Ante,* at 2429-2430. The Court should not take it upon itself to apply a newly-formulated legal standard to an undeveloped record. Given the District Court's statement that the committee may examine "any number of applicants, including applicants other than under-represented minority applicants," 122 F.Supp.2d 811, 830 (E.D.Mich.2000), it is quite possible that further factual development would reveal the committee to be a "source of individualized consideration" sufficient to satisfy the Court's rule, *ante,* at 2432 (O'CONNOR, J., concurring). Determination of that issue in the first instance is a job for the District Court, not for this Court on a record that is admittedly lacking.

Without knowing more about how the Admissions Review Committee actually functions, it seems especially unfair to treat the candor of the admissions plan as an Achilles' heel. In contrast to the college's forthrightness in saying just what plus factor it gives for membership in an underrepresented minority, it is worth considering the character of one alternative thrown up as preferable, because supposedly not based on race. Drawing on admissions systems used at public universities in California, Florida, and Texas, the United States contends that Michigan could get student diversity in satisfaction of its compelling interest by guaranteeing admission to a fixed percentage of the top students from each high school in Michigan. Brief for United States as *Amicus Curiae* 18; Brief for United States as *Amicus Curiae* in *Grutter v. Bollinger,* O.T.2002, No. 02-241, pp. 13-17.

While there is nothing unconstitutional about such a practice, it nonetheless suffers from a serious disadvantage. [FN4] It ***298** is the disadvantage of deliberate obfuscation. The "percentage plans" are just as race conscious as the point scheme (and fairly so), but they get their racially diverse results without saying directly what they are doing or why they are doing it. In contrast, Michigan states its purpose directly and, if this were a doubtful case for me, I would be tempted to give Michigan an extra point of its own for its frankness. Equal protection cannot become an exercise in which the winners are the ones who hide the ball.

> FN4. Of course it might be pointless in the State of Michigan, where minorities are a much smaller fraction of the population than in California, Florida, or Texas. Brief for Respondents Bollinger et al. 48- 49.

III

If this plan were challenged by a plaintiff with proper standing under Article III, I would affirm the judgment of the District Court granting summary judgment to the college. As it is, I would vacate the judgment for lack of jurisdiction, and I respectfully dissent.

Justice GINSBURG, with whom Justice SOUTER joins, dissenting. [FN*]

> FN* Justice BREYER joins Part I of this opinion.

I

Educational institutions, the Court acknowledges, are not barred from any and all consideration of race when making admissions decisions. *Ante,* at 2426- 2427; see *Grutter v. Bollinger, ante,* at ---- - ----, 123 S.Ct., at 2337- 2341, 2003 WL 21433492.

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But the Court once again maintains that the same standard of review controls judicial inspection of all official race classifications. *Ante,* at 2427 (quoting **2443 *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 224, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995); *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 494, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (plurality opinion)). This insistence on "consistency," *Adarand,* 515 U.S., at 224, 115 S.Ct. 2097, would be fitting were our Nation free of the vestiges of rank discrimination long reinforced by law, see *id.,* at 274-276, and n. 8, 115 S.Ct. 2097 (GINSBURG, J., dissenting). But we are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools.

*299 In the wake "of a system of racial caste only recently ended," *id.,* at 273, 115 S.Ct. 2097 (GINSBURG, J., dissenting), large disparities endure. Unemployment, [FN1] poverty, [FN2] and access to health care [FN3] vary disproportionately by race. neighborhoods and schools remain racially divided. [FN4] African-American and Hispanic children are all too often educated in poverty-*300 stricken and underperforming institutions. [FN5] Adult African-Americans and Hispanics generally earn less than whites with equivalent levels of education. [FN6] Equally credentialed job applicants receive different receptions depending on their race. [FN7] Irrational prejudice is still encountered in real estate **2444 markets [FN8] and consumer transactions. [FN9] "Bias both *301 conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice." *Id.,* at 274, 115 S.Ct. 2097 (GINSBURG, J., dissenting); see generally Krieger, Civil Rights Perestroika: Intergroup Relations After Affirmative Action, 86 Calif. L.Rev. 1251, 1276-1291 (1998).

FN1. See, *e.g.,* U.S. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States: 2002, p. 368 (2002) (Table 562) (hereinafter Statistical Abstract) (unemployment rate among whites was 3.7% in 1999, 3.5% in 2000, and 4.2% in 2001; during those years, the unemployment rate among African-Americans was 8.0%, 7.6%, and 8.7%, respectively; among Hispanics, 6.4%, 5.7%, and 6.6%).

FN2. See, *e.g.,* U.S. Dept of Commerce, Bureau of Census, Poverty in the United States: 2000, p. 291 (2001) (Table A) (In 2000, 7.5% of non-Hispanic whites, 22.1% of African-Americans, 10.8% of Asian-Americans, and 21.2% of Hispanics were living in poverty); S. Staveteig & A. Wigton, Racial and Ethnic Disparities: Key Findings from the National Survey of America's Families 1 (Urban Institute Report B-5, 2000) ("Blacks, Hispanics, and Native Americans ... each have poverty rates almost twice as high as Asians and almost three times as high as whites.").

FN3. See, *e.g.,* U.S. Dept. of Commerce, Bureau of Census, Health Insurance Coverage: 2000, p. 391 (2001) (Table A) (In 2000, 9.7% of non-Hispanic whites were without health insurance, as compared to 18.5% of African-Americans, 18.0% of Asian-Americans, and 32.0% of Hispanics.); Waidmann & Rajan, Race and Ethnic Disparities in Health Care Access and Utilization: An Examination of State Variation, 57 Med. Care Res. and Rev. 55, 56 (2000) ("On average, Latinos and African Americans have both worse health and worse access to effective health care than do non-Hispanic whites ... .").

FN4. See, *e.g.,* U.S. Dept. of Commerce, Bureau of Census, Racial and Ethnic Residential Segregation in the United States: 1980-2000 (2002) (documenting residential segregation); E. Frankenberg, C. Lee, & G. Orfield, A Multiracial Society with Segregated Schools: Are We Losing the Dream? 4 (Jan.2003), http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf

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(all Internet materials as visited June 2, 2003, and available in Clerk of Court's case file), ("[W]hites are the most segregated group in the nation's public schools; they attend schools, on average, where eighty percent of the student body is white."); *id.*, at 28 ("[A]lmost three-fourths of black and Latino students attend schools that are predominantly minority .... More than one in six black children attend a school that is 99-100% minority .... One in nine Latino students attend virtually all minority schools.").

FN5. See, *e.g.*, Ryan, Schools, Race, and Money, 109 Yale L.J. 249, 273-274 (1999) ("Urban public schools are attended primarily by African-American and Hispanic students"; students who attend such schools are disproportionately poor, score poorly on standardized tests, and are far more likely to drop out than students who attend nonurban schools.).

FN6. See, *e.g.*, Statistical Abstract 140 (Table 211).

FN7. See, *e.g.*, Holzer, Career Advancement Prospects and Strategies for Low-Wage Minority Workers, in Low-Wage Workers in the New Economy 228 (R. Kazis & M. Miller eds. 2001) ("[I]n studies that have sent matched pairs of minority and white applicants with apparently equal credentials to apply for jobs, whites routinely get more interviews and job offers than either black or Hispanic applicants."); M. Bertrand & S. Mullainathan, Are Emily and Brendan More Employable than Lakisha and Jamal?: A Field Experiment on Labor Market Discrimination (Nov. 18, 2002), http:// gsb.uchicago.edu/pdf/bertrand.pdf; Mincy, The Urban Institute Audit Studies: Their Research and Policy Context, in Clear and Convincing Evidence: Measurement of Discrimination in America 165-186 (M. Fix & R. Struyk eds.1993).

FN8. See, *e.g.*, M. Turner et al., Discrimination in Metropolitan Housing Markets: National Results from Phase I HDS 2000, pp. i, iii (Nov.2002), http://www.huduser.org/Publications/pdf/Phase1_Report.pdf (paired testing in which "two individuals--one minority and the other white--pose as otherwise identical homeseekers, and visit real estate or rental agents to inquire about the availability of advertised housing units" revealed that "discrimination still persists in both rental and sales markets of large metropolitan areas nationwide"); M. Turner & F. Skidmore, Mortgage Lending Discrimination: A Review of Existing Evidence 2 (1999) (existing research evidence shows that minority homebuyers in the United States "face discrimination from mortgage lending institutions.").

FN9. See, *e.g.*, Ayres, Further Evidence of Discrimination in New Car Negotiations and Estimates of its Cause, 94 Mich. L.Rev. 109, 109-110 (1995) (study in which 38 testers negotiated the purchase of more than 400 automobiles confirmed earlier finding "that dealers systematically offer lower prices to white males than to other tester types").

The Constitution instructs all who act for the government that they may not "deny to any person ... the equal protection of the laws." Amdt. 14, § 1. In implementing this equality instruction, as I see it, government decisionmakers may properly distinguish between policies of exclusion and inclusion. See *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 316, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (STEVENS, J., dissenting). Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its after effects have been extirpated. See Carter, When Victims Happen To Be Black, 97 Yale L.J. 420, 433-434 (1988) ("[T]o say that two centuries of struggle for the most basic of civil rights have been mostly about freedom from racial categorization rather than freedom from racial

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oppressio[n] is to trivialize the lives and deaths of those who have suffered under racism. To pretend ... that the issue presented in [*Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978)] was the same as the issue in [*Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954)] is to pretend that history never happened and that the present doesn't exist.").

Our jurisprudence ranks race a "suspect" category, "not because [race] is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality." *Norwalk Core v. Norwalk Redevelopment Agency,* 395 F.2d 920, 931-932 (C.A.2 1968) (footnote omitted). But where race is considered "for the purpose of achieving equality," *id.,* at 932, no automatic proscription is in order. ***302** For, as insightfully explained, "[t]he Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination." *United States v. Jefferson County Bd. of Ed.,* 372 F.2d 836, 876 (C.A.5 1966) (Wisdom, J.); see Wechsler, The Nationalization Of Civil Liberties And Civil Rights, Supp. to 12 Tex. Q. 10, ****2445** 23 (1968) (*Brown* may be seen as disallowing racial classifications that "impl[y] an invidious assessment" while allowing such classifications when "not invidious in implication" but advanced to "correct inequalities"). Contemporary human rights documents draw just this line; they distinguish between policies of oppression and measures designed to accelerate *de facto* equality. See *Grutter, ante,* at ----, 123 S.Ct., at 2347, 2003 WL 21433492 (GINSBURG, J., concurring) (citing the United Nations-initiated Conventions on the Elimination of All Forms of Racial Discrimination and on the Elimination of All Forms of Discrimination against Women).

The mere assertion of a laudable governmental purpose, of course, should not immunize a race-conscious measure from careful judicial inspection. See *Jefferson County,* 372 F.2d, at 876 ("The criterion is the relevancy of color to a legitimate governmental purpose."). Close review is needed "to ferret out classifications in reality malign, but masquerading as benign," *Adarand,* 515 U.S., at 275, 115 S.Ct. 2097 (GINSBURG, J., dissenting), and to "ensure that preferences are not so large as to trammel unduly upon the opportunities of others or interfere too harshly with legitimate expectations of persons in once-preferred groups," *id.,* at 276, 115 S.Ct. 2097.

II

Examining in this light the admissions policy employed by the University of Michigan's College of Literature, Science, and the Arts (College), and for the reasons well stated by ***303** Justice SOUTER, I see no constitutional infirmity. See *ante,* at 2439-2442 (dissenting opinion). Like other top-ranking institutions, the College has many more applicants for admission than it can accommodate in an entering class. App. to Pet. for Cert. 108a. Every applicant admitted under the current plan, petitioners do not here dispute, is qualified to attend the College. *Id.,* at 111a. The racial and ethnic groups to which the College accords special consideration (African-Americans, Hispanics, and Native-Americans) historically have been relegated to inferior status by law and social practice; their members continue to experience class-based discrimination to this day, see *supra,* at 2442-2444. There is no suggestion that the College adopted its current policy in order to limit or decrease enrollment by any particular racial or ethnic group, and no seats are reserved on the basis of race. See Brief for Respondents 10; Tr. of Oral Arg. 41-42 (in the range between 75 and 100 points, the review committee may look at applications individually and ignore the points). Nor has there been any demonstration that the College's program unduly constricts admissions opportunities for students who do not receive special consideration based on race. Cf. Liu, The Causation Fallacy: *Bakke* and the Basic Arithmetic of Selective Admissions, 100 Mich. L.Rev. 1045, 1049 (2002) ("In any admissions process where applicants greatly outnumber admittees, and where white applicants greatly outnumber minority applicants, substantial

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preferences for minority applicants will not significantly diminish the odds of admission facing white applicants."). [FN10]

FN10. The United States points to the "percentage plans" used in California, Florida, and Texas as one example of a "race-neutral alternativ [e]" that would permit the College to enroll meaningful numbers of minority students. Brief for United States as *Amicus Curiae* 14; see Commission on Civil Rights, Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education 1 (Nov.2002), http:// www.usccr.gov/pubs/ percent2/percent2.pdf (percentage plans guarantee admission to state universities for a fixed percentage of the top students from high schools in the State). Calling such 10 or 20% plans "race-neutral" seems to me disingenuous, for they "unquestionably were adopted with the specific purpose of increasing representation of African-Americans and Hispanics in the public higher education system." Brief for Respondents 44; see C. Horn & S. Flores, Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences 14-19 (2003), http:// www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.pdf. Percentage plans depend for their effectiveness on continued racial segregation at the secondary school level: They can ensure significant minority enrollment in universities only if the majority-minority high school population is large enough to guarantee that, in many schools, most of the students in the top 10 or 20% are minorities. Moreover, because such plans link college admission to a single criterion--high school class rank--they create perverse incentives. They encourage parents to keep their children in low-performing segregated schools, and discourage students from taking challenging classes that might lower their grade point averages. See Selingo, What States Aren't Saying About the "X-Percent Solution," Chronicle of Higher Education, June 2, 2000, p. A31. And even if percentage plans could boost the sheer numbers of minority enrollees at the undergraduate level, they do not touch enrollment in graduate and professional schools.

****2446 *304** The stain of generations of racial oppression is still visible in our society, see Krieger, 86 Calif. L.Rev., at 1253, and the determination to hasten its removal remains vital. One can reasonably anticipate, therefore, that colleges and universities will seek to maintain their minority enrollment--and the networks and opportunities thereby opened to minority graduates--whether or not they can do so in full candor through adoption of affirmative action plans of the kind here at issue. Without recourse to such plans, institutions of higher education may resort to camouflage. For example, schools may encourage applicants to write of their cultural traditions in the essays they submit, or to indicate whether English is their second language. Seeking to improve their chances for admission, applicants may highlight the minority group associations to which they belong, or the Hispanic surnames of their mothers or grandparents. In turn, teachers' recommendations may emphasize who a student is as much as what he or she has accomplished. See, *e.g.*, Steinberg, Using Synonyms for Race, College Strives for Diversity, ***305** N.Y. Times, Dec. 8, 2002, section 1, p. 1, col. 3 (describing admissions process at Rice University); cf. Brief for United States as *Amicus Curiae* 14-15 (suggesting institutions could consider, *inter alia*, "a history of overcoming disadvantage," "reputation and location of high school," and "individual outlook as reflected by essays"). If honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises. [FN11]

FN11. Contrary to the Court's contention, I do not suggest "changing the Constitution so that it conforms to the conduct of the universities." *Ante*, at 2430, n. 22. In my

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> view, the Constitution, properly interpreted, permits government officials to respond openly to the continuing importance of race. See *supra,* at 2444-2445. Among constitutionally permissible options, those that candidly disclose their consideration of race seem to me preferable to those that conceal it.
>
> * * *

For the reasons stated, I would affirm the judgment of the District Court.

539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257, 71 USLW 4480, 91 Fair Empl.Prac.Cas. (BNA) 1803, 84 Empl. Prac. Dec. P 41,416, 177 Ed. Law Rep. 851, 3 Cal. Daily Op. Serv. 5362, 2003 Daily Journal D.A.R. 6783, 16 Fla. L. Weekly Fed. S 387

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• 2003 WL 1610798 (Appellate Brief) Petitioners' Reply Brief (Mar. 24, 2003)

• 2003 WL 1339512 (Appellate Brief) Motion for Leave to File Brief Amicus Curiae Out of Time and Brief of BP America Incorporated as Amicus Curiae in Support of Neither Party (Mar. 17, 2003)

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• 2003 WL 401027 (Appellate Brief) Brief of Amici Curiae National School Boards Association, et al., in Support of Respondents (Feb. 19, 2003)

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• 2003 WL 536743 (Appellate Brief) Brief Amicus Curiae of American Federation of Labor & Congress of Industrial Organizations in Support of Respondents (Feb. 19, 2003)

• 2003 WL 536770 (Appellate Brief) Brief of the Leadership Conference on Civil Rights and the LCCR Education Fund as Amici Curiae in Support of Respondents (Feb. 19, 2003)

• 2003 WL 537919 (Appellate Brief) Brief of New York City Council Speaker A. Gifford Miller, New York City Council Members Bill de Blasio, Helen Foster, Hiram Monserrate, Charles Barron, William Perkins, Joel Rivera, Leroy G. Comrie and other Individual Members of the New York City Co uncil as Amici Curiae in Support of Respondents (Feb. 19, 2003)

• 2003 WL 538556 (Appellate Brief) Brief of the States of Maryland, New York, Arizona, California, Colorado, Connecticut, Illinois, Iowa, Maine, Massachusetts, Minnesota, Montana, New Mexico, North Carolina, Oklahoma, Oregon, Rhode Island, Vermont, Washington, West Virginia, Wisconsin , and the Territory of the U.S. Virgin Islands as Amici Curiae in Support of Respondents (Feb. 19, 2003)

• 2003 WL 367213 (Appellate Brief) Brief of

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Howard University as Amicus Curiae in Support of Respondents (Feb. 18, 2003)

• 2003 WL 367215 (Appellate Brief) Brief of Amici Curiae Massachusetts Institute of Technology, Leland Stanford Junior University, E.I. Du Pont De Nemours and Company, International Business Machines Corp., National Academy of Sciences, National Academy of Engineering, National Action Council for Minorities in Engineering, Inc., in Support of Respondents (Feb. 18, 2003)

• 2003 WL 367216 (Appellate Brief) Brief for the Patterson Respondents (Feb. 18, 2003)

• 2003 WL 398321 (Appellate Brief) Brief Amicus Curiae of the American Psychological Association in Support of Respondents (Feb. 18, 2003)

• 2003 WL 398376 (Appellate Brief) Brief of John Conyers, Jr., Member of Congress; John D. Dingell, Member of Congress; Charles B. Rangel, Member of Congress; Fortney Pete Stark, Member of Congress; Edward J. Markey, Member of Congress; George Miller, Member of Congress; Dale E. Kilde e, Member of Congress; Martin Frost, Member of Congress; Robert T. Matsui, Member of Congress; Martin Olav Sabo, Member of Congress; Barney Frank, Member of Congress; Steny H. Hoyer, Member of Congress; et al., as Amici Curiae in Support of Responde (Feb. 18, 2003)

• 2003 WL 399056 (Appellate Brief) Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents (Feb. 18, 2003)

• 2003 WL 399066 (Appellate Brief) Brief of the University of Pittsburgh, Temple University, Wayne State University, and the University of Arizona as Amici Curiae in Support of Respondents (Feb. 18, 2003)

• 2003 WL 399093 (Appellate Brief) Brief of Amici Curiae City of Philadelphia, Pennsylvania, City of Cleveland, Ohio and the National Conference of Black Mayors, Inc. in Support of Respondents (Feb. 18, 2003)

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• 2003 WL 400774 (Appellate Brief) Brief Amicus Curiae of the National Education Association, et al., in Support of Respondents (Feb. 18, 2003)

• 2003 WL 401105 (Appellate Brief) Brief of the National Urban League, The Southern Christian Leadership Conference of Los Angeles, and The National Rainbow/Push Coalition as Amici Curiae in Support of Respondents (Feb. 18, 2003)

• 2003 WL 401532 (Appellate Brief) Brief of the New America Alliance as Amicus Curiae Supporting the Respondents (Feb. 18, 2003)

• 2003 WL 402129 (Appellate Brief) Brief of Social Scientists Glenn C. Loury, Nathan Glazer, John F. Kain, Thomas J. Kane, Douglas Massey, Marta Tienda and Brian Bucks as Amici Curiae in Support of Respondents (Feb. 18, 2003)

• 2003 WL 402131 (Appellate Brief) Brief for the United Negro College Fund and Kappa Alpha PSI as Amici Curiae in Support of Respondents (Feb. 18, 2003)

• 2003 WL 402134 (Appellate Brief) Brief of the American Educational Research Association, The Association of American Colleges and Universities, and The American Association for Higher Education as Amici Curiae in Support of Respondents (Feb. 18, 2003)

• 2003 WL 402140 (Appellate Brief) Brief of Members of the United States Congress as Amici Curiae in Support of Respondents (Feb. 18, 2003)

• 2003 WL 402142 (Appellate Brief) Brief of the Authors of the Texas Ten Percent Plan as Amicus Curiae in Support of Respondents (Feb. 18, 2003)

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• 2003 WL 402203 (Appellate Brief) Brief for the Bay Mills Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Hannahville Indian Community, Keweenaw Bay Indian Community, Lac Vieux Desert Band or Lake Superior Chippewa Indians, Little River Band of Ottawa Indians, L ittle Traverse Bay Bands of Odawa Indians, Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians of Michigan, Nottawaseppi Huron Band of Potawatomi, Oneida Tribe of Indians of Wisconsin, Sault Ste. Marie Tribe of Chippewa Indians, and Michigan Indian (Feb. 18, 2003)

• 2003 WL 402218 (Appellate Brief) Brief Amicus Curiae of the College Board in Support of Respondents (Feb. 18, 2003)

• 2003 WL 402237 (Appellate Brief) Brief for Respondents (Feb. 18, 2003)

• 2003 WL 536740 (Appellate Brief) Brief of Latino Organizations as Amici Curiae in Support of Respondents (Feb. 18, 2003)

• 2003 WL 554406 (Appellate Brief) Brief Amicus Curiae of the Black Women Lawyers Association of Greater Chicago, Inc., in Support of Respondents (Feb. 18, 2003)

• 2003 WL 554414 (Appellate Brief) Brief of Amici Curiae Media Companies in Support of Respondents (Feb. 18, 2003)

• 2003 WL 399075 (Appellate Brief) Brief of Amherst, Barnard, Bates, Bowdoin, Bryn Mawr, Carleton, Colby, Connecticut, Davidson, Franklin & Marshall, Hamilton, Hampshire, Haverford, Macalester, Middlebury, Mount Holyoke, Oberlin, Pomona, Sarah Lawrence, Smith, Swarthmore, Trinity, Vas sar, Wellesley, and Williams Colleges, and Colgate, Wesleyan and Tufts Universities, Amici Curiae, Supporting Respondents (Feb. 14, 2003)

• 2003 WL 399078 (Appellate Brief) Brief of Carnegie Mellon University and 37 Fellow Private Colleges and Universities as Amicus Curiae in Support of Respondents American University Belmont University Boston College Brandeis University Bucknell University California Institute of Techn ology Carnegie Mellon University Case Western Reserve University College of the Holy Cross DePaul University Dickinson College Drexel University Duquesne University of the Holy Spirit Elizabethtown College Emory University Fairleigh Dickinson Univer (Feb. 14, 2003)

• 2003 WL 399226 (Appellate Brief) Brief Amici Curiae Human Rights Advocates and the University of Minnesota Human Rights Center in Support of Respondents (Feb. 14, 2003)

• 2003 WL 399363 (Appellate Brief) Brief of Amicus Curiae Michigan Governor Jennifer M. Granholm (Feb. 14, 2003)

• 2003 WL 400140 (Appellate Brief) Brief of Amici Curiae National Asian Pacific American Legal Consortium, Asian Law Caucus, Asian Pacific American Legal Center, et al., in Support of Respondents (Feb. 14, 2003)

• 2003 WL 400443 (Appellate Brief) Brief Amici Curiae of The National Coalition of Blacks for Reparations in America (N'Cobra) and The National Conference of Black Lawyers (NCBL) in Support of Respondents (Feb. 14, 2003)

• 2003 WL 401912 (Appellate Brief) Brief of Amicus Curiae State of New Jersey in Support of Respondents (Feb. 14, 2003)

• 2003 WL 402220 (Appellate Brief) Amicus Curiae Brief of Northeastern University Supporting the Respondents (Feb. 14, 2003)

• 2003 WL 536749 (Appellate Brief) Brief Amici Curiae of the American Jewish Committee; Central Conference of American Rabbis; Hadassah; National Conference for Community and Justice; National Council of Jewish Women; Progressive Jewish Alliance; Union of American Hebrew Congregations ; and Women of Reform Judaism, The Federation of Temple Sisterhoods in Support of Respondents (Feb. 14, 2003)

• 2003 WL 399094 (Appellate Brief) Brief of Amici

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Curiae Columbia University, Cornell University, Georgetown University, Rice University and Vanderbilt University in Support of Respondents (Feb. 13, 2003)

• 2003 WL 402128 (Appellate Brief) Brief of Representative Richard A. Gephardt, et al., as Amici Curiae Supporting Respondents (Feb. 13, 2003)

• 2003 WL 252508 (Appellate Brief) Brief of the Hayden Family as Amicus Curiae in Support of Respondents (Jan. 31, 2003)

• 2003 WL 151258 (Appellate Brief) Brief for the United States as Amicus Curiae Supporting Petitioner (Jan. 16, 2003)

• 2003 WL 152360 (Appellate Brief) Brief Amicus Curiae of Anti-Defamation League in Support of Neither Party (Jan. 16, 2003)

• 2003 WL 152363 (Appellate Brief) Brief of the Asian American Legal Foundation as Amicus Curiae in Support of Petitioners (Jan. 16, 2003)

• 2003 WL 152364 (Appellate Brief) Brief of the Cato Institute as Amicus Curiae in Support of Petitioners (Jan. 16, 2003)

• 2003 WL 152365 (Appellate Brief) Brief Amici Curiae of the Center for Equal Opportunity, the Independent Women's Forum, and the American Civil Rights Institute in Support of Petitioner (Jan. 16, 2003)

• 2003 WL 152369 (Appellate Brief) Brief of Amicus Curiae Center for Individual Freedom in Support of Petitioners (Jan. 16, 2003)

• 2003 WL 152371 (Appellate Brief) Brief of Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence In Support of Petitioners (Jan. 16, 2003)

• 2003 WL 152372 (Appellate Brief) Brief Amicus Curiae of the Equal Employment Advisory Council in Support of Neither Party (Jan. 16, 2003)

• 2003 WL 164152 (Appellate Brief) Brief of the Center for the Advancement of Capitalism as Amicus Curiae Supporting the Petitioners (Jan. 16, 2003)

• 2003 WL 164182 (Appellate Brief) Brief of Amicus Curiae the Michigan Association of Scholars in Support of Petitioners (Jan. 16, 2003)

• 2003 WL 164186 (Appellate Brief) Brief for the Petitioners (Jan. 16, 2003)

• 2003 WL 176629 (Appellate Brief) Brief for the United States as Amicus Curiae Supporting Petitioners (Jan. 16, 2003)

• 2003 WL 182930 (Appellate Brief) Brief of the State of Florida and the Honorable John Ellis "Jeb" Bush, Governor, as Amici Curiae in Support of Petitioners (Jan. 16, 2003)

• 2003 WL 21699248 (Appellate Petition, Motion and Filing) Brief Amicus Curiae of Duane C. Ellison, Pro se, in support of Petitioner (Jan. 16, 2003)Original Image of this Document (PDF)

• 2003 WL 252513 (Appellate Brief) Brief Amicus Curiae of Reason Foundation in Support of Petitioners (Jan. 16, 2003)

• 2003 WL 367212 (Appellate Brief) Brief Amicus Curiae of Duane C. Ellison, Pro se, in support of Petitioner (Jan. 16, 2003)

• 2003 WL 144864 (Appellate Brief) Brief of the Center for New Black Leadership as Amicus Curiae in Support of Petitioners (Jan. 15, 2003)

• 2003 WL 145515 (Appellate Brief) Brief for Amicus Curiae National Association of Scholars in Support of Petitioners (Jan. 15, 2003)

• 2003 WL 145520 (Appellate Brief) Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioners (Jan. 14, 2003)

• 2002 WL 32101109 (Appellate Petition, Motion and Filing) Reply Brief (Nov. 12, 2002)Original Image of this Document (PDF)

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539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257, 71 USLW 4480, 91 Fair Empl.Prac.Cas. (BNA) 1803, 84 Empl. Prac. Dec. P 41,416, 177 Ed. Law Rep. 851, 3 Cal. Daily Op. Serv. 5362, 2003 Daily Journal D.A.R. 6783, 16 Fla. L. Weekly Fed. S 387
(Cite as: 539 U.S. 244, 123 S.Ct. 2411)

• 2002 WL 32101100 (Appellate Petition, Motion and Filing) Brief in Conditional Opposition to Certiorari Before Judgment (Oct. 29, 2002)Original Image of this Document (PDF)

• 2002 WL 32101145 (Appellate Petition, Motion and Filing) Petition for Writ of Certiorari (Oct. 01, 2002)Original Image of this Document (PDF)

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83 S.Ct. 801
372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821
(Cite as: 372 U.S. 368, 83 S.Ct. 801)

Supreme Court of the United States

James H. GRAY et al., Appellants,
v.
James O'Hear SANDERS.

No. 112.

Argued Jan. 17, 1963.
Decided March 18, 1963.

Suit by qualified voter to restrain defendants from using county unit system as basis for counting votes in primary election for statewide offices and for declaratory relief. A three-judge United States District Court for the Northern District of Georgia, 203 F.Supp. 158, entered judgment for the plaintiff and the defendants appealed. The Supreme Court, Mr. Justice Douglas, held that federal district court properly enjoined conduct of statewide primary election under county unit system which gave every qualified voter one vote, but which, in counting votes, employed a system which in end result weighted rural votes more heavily than urban votes and weighted some small rural counties heavier than other larger rural counties.

District Court judgment vacated and case remanded with directions.

Mr. Justice Harlan dissented.

West Headnotes

[1] Courts ⇨101
106k101 Most Cited Cases
[1] Federal Courts ⇨992
170Bk992 Most Cited Cases
As the constitutionality of state statute was involved and question presented was a substantial one, a three-judge federal court was properly convened. 28 U.S.C.A. § 2281.

[2] Constitutional Law ⇨254(2)
92k254(2) Most Cited Cases
(Formerly 92k254)
Action of democratic committee in holding primary election for statewide offices constituted "state action" within meaning of Fourteenth Amendment, as state regulation of primary election process made it state action. U.S.C.A.Const. Amend. 14.

[3] Constitutional Law ⇨42.2(1)
92k42.2(1) Most Cited Cases
(Formerly 92k42)
Any person whose right to vote was impaired by conduct of primary elections for statewide offices had standing to sue on ground that system used in counting votes cast violated the Seventeenth Amendment and Equal Protection Clause and Due Process Clause of the Fourteenth Amendment. U.S.C.A.Const. Amends. 14, 17; 28 U.S.C.A. § 2281.

[4] Injunction ⇨22
212k22 Most Cited Cases
Qualified voter's suit to restrain officials from using state's county unit system as basis for counting votes in primary for statewide offices was not rendered moot by reason of fact that state Democratic Committee had voted to hold primary on popular vote basis, where, but for injunction issued by federal court, state statute providing for such county unit system remained in force. U.S.C.A.Const. art. 2, § 1; Amend. 12.

[5] Action ⇨6
13k6 Most Cited Cases
Voluntary abandonment of practice does not relieve court of adjudicating its legality, particularly where practice is deeply rooted and long-standing.

[6] Elections ⇨15
144k15 Most Cited Cases
Inclusion of electoral college in federal Constitution as result of specific historical concern validated collegiate principle despite its inherent numerical inequality, but implied nothing about use of analogous system by state in state-wide election. U.S.C.A.Const. art. 2, § 1.

[7] Elections ⇨18
144k18 Most Cited Cases
States can within limits specify qualifications of voters both in state and federal elections. U.S.C.A.Const. art. 1, § 2; Amends. 14, 15, 17, 19.

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[8] Elections ⇐18
144k18 Most Cited Cases
State may if it chooses require voters to pass literacy tests, provided that literacy is not used as cloak to discriminate against one class or group. U.S.C.A.Const. Amends. 14, 17.
[9] Elections ⇐15
144k15 Most Cited Cases
Once geographical unit for which representative is to be chosen is designated, all who participate in election are entitled to have an equal vote regardless of race, sex, occupation, income and location of home in geographical unit. U.S.C.A.Const. Amend. 14.
[10] Elections ⇐11
144k11 Most Cited Cases
All qualified voters have constitutionally protected right to cast their ballots and have them counted at congressional elections. U.S.C.A.Const. art. 1, § 2; Amend. 14.
[11] Elections ⇐11
144k11 Most Cited Cases
Every voter's vote is entitled to be correctly counted once and reported, and can be protected from diluting effect of illegal ballots. U.S.C.A.Const. art. 1, § 2; Amend. 14.
[12] Elections ⇐11
144k11 Most Cited Cases
Right of voter to have his vote counted correctly once and reported and to be protected from diluting effect of illegal ballots must be recognized in any preliminary election that in fact determines true weight that vote will have. U.S.C.A.Const. art. 1, § 2; Amend. 14.
[13] Elections ⇐11
144k11 Most Cited Cases
Concept of political equality in voting booth contained in Fifteenth Amendment extends to all phases of state elections. U.S.C.A.Const. Amend. 15.
[14] Elections ⇐15
144k15 Most Cited Cases
There is no constitutional indication that homesite or occupation affords permissible basis for distinguishing between qualified voters within state. U.S.C.A.Const. Amends. 14, 15.
[15] Elections ⇐11
144k11 Most Cited Cases
Only weighting of votes sanctioned by Constitution concerns matters of representation, such as allocation of Senators irrespective of population and use of electoral college in choice of President. U.S.C.A.Const. art. 1, § 2.
[16] Elections ⇐11
144k11 Most Cited Cases
Minors, felons and other classes may be excluded from voting, but once class of voters is chosen and their qualifications specified there is no constitutional way by which equality of voting power may be evaded. U.S.C.A.Const. art. 1, § 2; Amend. 14.
[17] Federal Courts ⇐161
170Bk161 Most Cited Cases
(Formerly 106k262.4(1))
When state exercises power wholly within domain of state interest it is insulated from federal judicial review, but such insulation is not carried over when state power is used as instrument for circumventing federally protected right.
[18] States ⇐27(10)
360k27(10) Most Cited Cases
(Formerly 106k262.4(11))
Federal district court, on suit of qualified state voter, properly enjoined conduct of statewide primary election under county unit system which gave every qualified voter one vote, but which, in counting votes, employed a system which in end result weighted rural votes more heavily than urban votes and weighted some small rural counties heavier than other larger rural counties. U.S.C.A.Const. Amends. 14, 17; 28 U.S.C.A. § 2281; Const.Ga. art. 3, § 3, par. 1; Code Ga. §§ 34-3212, 34-3213.
[19] Constitutional Law ⇐250.2(2)
92k250.2(2) Most Cited Cases
(Formerly 92k225.3(10), 92k225(1), 92k274)
[19] Elections ⇐11
144k11 Most Cited Cases
[19] Elections ⇐21
144k21 Most Cited Cases
State's county unit system, which gave every qualified voter in statewide election one vote, but which, in counting votes, employed system which in end result weighted rural votes more heavily that urban votes and weighted some small rural counties heavier than other large rural counties, violated the Seventeenth Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. U.S.C.A.Const. Amends. 14, 17; Const.Ga. art. 3, § 3, par. 1; Code Ga. §§ 34-3212, 34-3213.
****803 *369** B. D. Murphy and E. Freeman

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Leverett, Atlanta, Ga., for appellants.

Morris B. Abram, Atlanta, Ga., for appellee.

***370** Atty. Gen., Robert F. Kennedy for the United States, as amicus curiae, by special leave of Court.

Mr. Justice DOUGLAS delivered the opinion of the Court.

I.

[1] This suit was instituted by appellee, who is qualified to vote in primary and general elections in Fulton County, Georgia, to restrain appellants from using Georgia's county unit system as a basis for counting votes in a Democratic primary for the nomination of a United States Senator and statewide officers, and for declaratory relief. Appellants are the Chairman and Secretary of the Georgia State Democratic Executive Committee, and the Secretary of State of Georgia. Appellee alleges that the use of the county unit system in counting, tabulating, consolidating, and certifying votes cast in primary elections for statewide offices violates the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment and the Seventeenth Amendment. As the constitutionality of a state statute was involved and the question was a substantial one, a three-judge court was properly convened. See 28 U.S.C. s 2281; United States v. Georgia Public Service Comm., 371 U.S. 285, 83 S.Ct. 397, 9 L.Ed.2d 317.

Appellants moved to dismiss; and they also filed an answer denying that the county unit system was unconstitutional and alleging that it was designed 'to achieve a reasonable balance as between urban and rural electoral power.'

Under Georgia law each county is given a specified number of representatives in the lower House of the General ***371** Assembly. [FN1] This county unit system at the time this suit was filed was employed as follows in statewide primaries: [FN2] (1) Candidates for nominations who received the highest number of ****804** popular votes in a county were considered to have carried the county and to be entitled to two votes for each representative to which the county is entitled in the lower House of the General Assembly; (2) the majority of the county unit vote nominated a United States Senator and Governor; the plurality of the county unit vote nominated the others.

FN1. Ga.Const.1945, Art. III, s III, I: 'The House of Representatives shall consist of representatives apportioned among the several counties of the State as follows: To the eight counties having the largest population, three representatives each; to the thirty counties having the next largest population, two representatives each; and to the remaining counties, one representative each.'

FN2. Ga.Code Ann. ss 34--3212, 34--3213 (1936).

Appellee asserted that the total population of Georgia in 1960 was 3,943,116; that the population of Fulton County, where he resides, was 556,326; that the residents of Fulton County comprised 14.11% of Georgia's total population; but that, under the county unit system, the six unit votes of Fulton County constituted 1.46% of the total of 410 unit votes, or one-tenth of Fulton County's percentage of statewide population. The complaint further alleged that Echols County, the least populous county in Georgia, had a population in 1960 of 1,876, or .05% of the State's population, but the unit vote of Echols County was .48% of the total unit vote of all counties in Georgia, or 10 times Echols County's statewide percentage of population. One unit vote in Echols County represented 938 residents, whereas one unit vote in Fulton County represented 92,721 residents. Thus, one resident in Echols County had an influence in the nomination of candidates equivalent to 99 residents of Fulton County.

***372** On the same day as the hearing in the District Court, Georgia amended the statutes challenged in the complaint. This amendment [FN3] modified the county unit system by allocating units to counties in accordance with a 'bracket system' instead of doubling the number of representatives of each county in the lower House of the Georgia Assembly. Counties with from 0 to 15,000 people were allotted two units; an additional one unit was allotted for the next 5,000 persons; an additional unit for the next 10,000 persons; another unit for

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each of the next two brackets of 15,000 persons; and, thereafter, two more units for each increase of 30,000 persons. Under the amended Act, all candidates for statewide office (not merely for Senator and Governor as under the earlier Act) are required to receive a majority of the county unit votes to be entitled to nomination in the first primary. In addition, in order to be nominated in the first primary, a candidate has to receive a majority of the popular votes unless there are only two candidates for the nomination and each receives an equal number of unit votes, in which event the candidate with the popular majority wins. If no candidate receives both a majority of the unit votes and a majority of the popular votes, a second run-off primary is required between the candidate receiving the highest number of unit votes and the candidate receiving the highest number of popular votes. In the second primary, the candidate receiving the highest number of unit votes is to prevail. But again, if there is a tie in unit votes, the candidate with the popular majority wins.

FN3. Ga.Laws 1962, Ex.Sess., No. 1, p. 1217; Ga.Code Ann., ss 34--3212, 34--3213 (1962).

Appellee was allowed to amend his complaint so as to challenge the amended Act. The District Court held that the amended Act had some of the vices of the prior Act. It stated that under the Amended Act 'the vote of ***373** each citizen counts for less and less as the population of the county of his residence increases.' 203 F.Supp. 158, 170, n. 10. It went on to say:

'There are 97 two-unit counties, totalling 194 unit votes, and 22 counties totalling 66 unit votes, altogether 260 unit votes, within 14 of a majority; but no county in the above has as much as 20,000 population. The remaining 40 counties range in population from 20,481 to 556,326, but they control altogether only 287 county unit votes. Combination of the units from the counties having the smallest population gives ****805** counties having population of one-third of the total in the state a clear majority of county units.' Ibid.

The District Court held that as a result of Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663, it had jurisdiction, that a justiciable case was stated, that appellee had standing, and that the Democratic primary in Georgia is 'state' action within the meaning of the Fourteenth Amendment. It held that the county unit system as applied violates the Equal Protection Clause, and it issued an injunction, [FN4] not against conducting any party primary election under the county unit system, but against conducting such an election under a county unit system that does not meet the requirements specified by the court. [FN5] ***374**203 F.Supp. 158. In other words, the District Court did not proceed on the basis that in a statewide election every qualified person was entitled to one vote and that all weighted voting was outlawed. Rather it allowed a county unit system to be used in weighting the votes if the system showed no greater disparity against a county than exists against any State in the conduct of national elections. [FN6] Thereafter the Democratic Committee voted to hold the 1962 primary election for the statewide offices mentioned on a popular vote basis. We noted probable jurisdiction. 370 U.S. 921, 82 S.Ct. 1564, 8 L.Ed.2d 502.

FN4. The order, dated April 28, 1962, was not restricted to the party primary of September 12, 1962; nor was the relief asked so restricted.

FN5. The District Court in its order defined the type of county unit system which violated the Equal Protection Clause as follows:

'A county unit system for use in a party primary is invidiously discriminatory if any unit has less than its share to the nearest whole number proportionate to population, or to the whole of the vote in a recent party gubernatorial primary, or to the vote for electors of the party in the most recent presidential election; provided, no discrimination is deemed to be invidious under such system if the disparity against any county is not in excess of the disparity that exists as against any state in the most recent electoral college allocation, or under the equal proportions formula for representation of the several states in the Congress of the United States, and, provided provision is made for allocations to be adjusted to

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accord with changes in the basis at least once each ten years.'

FN6. See note 5, supra.

II.

[2] We agree with the District Court that the action of this party in the conduct of its primary constitutes state action within the meaning of the Fourteenth Amendment. Judge Sibley, writing for the court in Chapman v. King, 5 Cir., 154 F.2d 460, showed with meticulous detail the manner in which Georgia regulates the conduct of party primaries (id. pp. 463--464) and he concluded:

'We think these provisions show that the State, through the managers it requires, collaborates in the conduct of the primary, and puts its power behind the rules of the party. It adopts the primary as a part of the public election machinery. The exclusions of voters made by the party by the primary rules become exclusions enforced by the State.' Id., p. 464.

We agree with that result and conclude that state regulation of this preliminary phase of the election process ***375** makes it state action. See United States v. Classic, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed 1368; Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987.

[3] We also agree that appellee, like any person whose right to vote is impaired (Smith v. Allwright, supra; Baker v. Carr, supra, 369 U.S. pp. 204--208, 82 S.Ct. pp. 703--705), has standing to sue. [FN7]

FN7. Chief Justice Holt stated over 250 years ago:

'A right that a man has to give his vote at the election of a person to represent him in parliament, there to concur to the making of laws, which are to bind his liberty and property, is a most transcendent thing, and of an high nature * * *. (I)t is a great injury to deprive * * * (him) of it. * * *

'* * * It would look very strange, when the commons of England are so fond of their right of sending representatives to parliament, that it should be in the power of a sheriff, or other officer, to deprive them of that right, and yet that they should have no remedy * * *. This right of voting is a right in the plaintiff by the common law, and consequently he shall maintain an action for the obstruction of it. * * *

'But in the principal case my brother says, we cannot judge of this matter, because it is a parliamentary thing. O! by all means be very tender of that. Besides it is intricate, and there may be contrariety of opinions. * * * To allow this action will make publick officers more careful to observe the constitution of cities and boroughs, and not to be so partial as they commonly are in all elections, which is indeed a great and growing mischief, and tends to the prejudice of the peace of the nation. But they say, that this is a matter out of our jurisdiction, and we ought not to inlarge it. I agree we ought not to incroach or inlarge our jurisdiction; * * * but sure we may determine on a charter granted by the king, or on a matter of custom or prescription, when it comes before us without incroaching on the parliament. And if it be a matter within our jurisdiction, we are bound by our oaths to judge of it. This is a matter of property determinable before us. Was ever such a petition heard of in parliament, as that a man was hindered of giving his vote, and praying them to give him remedy? The parliament undoubtedly would say, take your remedy at law. It is not like the case of determining the right of election between the candidates.' Ashby v. White, 2 Ld.Raym. 938, 953, 954, 956 (1702).

****806** [4][5] Moreover, we think the case is not moot by reason of the fact that the Democratic Committee voted to hold ***376** the 1962 primary on a popular vote basis. But for the injunction issued below, the 1962 Act remains in force; and if the complaint were dismissed it would govern future elections. In addition, the voluntary abandonment of a practice does not relieve a court of adjudicating its legality, particularly where the practice is deeply rooted and long standing. For if the case were dismissed as moot appellants would be 'free to return to * * * (their) old ways.' United States v. W. T. Grant Co., 345 U.S. 629, 632, 73 S.Ct. 894, 897, 97 L.Ed. 1303.

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III.

On the merits we take a different view of the nature of the problem than did the District Court.

This case, unlike Baker v. Carr, supra, does not involve a question of the degree to which the Equal Protection Clause of the Fourteenth Amendment limits the authority of a State Legislature in designing the geographical districts from which representatives are chosen either for the State Legislature or for the Federal House of Representatives. Nor does it include the related problems of Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110, where 'gerrymandering' was used to exclude a minority group from participation in municipal affairs. Nor does it present the question, inherent in the bicameral form of our Federal Government, whether a State may have one house chosen without regard to population. The District Court, however, analogized Georgia's use of the county unit system in determining the results of a statewide election to phases of our federal system. It pointed out that under the electoral college, [FN8] required by Art. II, s 1, of the Constitution ***377** and the Twelfth Amendment in the election ****807** of the President, voting strength 'is not in exact proportion to population * * *. Recognizing that the electoral college was set up as a compromise to enable the formation of the Union among the several sovereign states, it still could hardly be said that such a system used in a state among its counties, assuming rationality and absence of arbitrariness in end result, could be termed invidious.' 203 F.Supp., at 169.

> FN8. The electoral college was designed by men who did not want the election of the President to be left to the people. See S. Doc. No. 97, Survey of the Electoral College in the Political System of the United States, 79th Cong., 1st Sess. 'George Washington was elected to the office of Chief Magistrate of the Nation, by 69 votes--the total number cast by the electors. At that time, three States did not vote. New York had not yet passed an electoral law, and North Carolina and Rhode Island had not yet ratified the Constitution. Therefore, of an estimated population of 4,000,000 people, a President was chosen by 69 voters, who had not been selected by the people, but appointed by State legislatures, save in the instances of Maryland and Virginia.' Id., p. 4.
> Hamilton expressed the philosophy behind the electoral college in The Federalist No. 68. 'This process of election affords a moral certainty, that the office of president, will seldom fall to the lot of any man, who is not in an eminent degree endowed with the requisite qualifications. Talents for low intrigue and the little arts of popularity may alone suffice to elevate a man to the first honors in a single state; but it will require other talents and a different kind of merit to establish him in the esteem and confidence of the whole union, or of so considerable a portion of it as would be necessary to make him a successful candidate for the distinguished office of president of the United States. It will not be too strong to say, that there will be a constant probability of seeing the station filled by characters preeminent for ability and virtue. And this will be thought no inconsiderable recommendation of the constitution, by those, who are able to estimate the share, which the executive in every government must necessarily have in its good or ill administration.'
> Passage of the Fifteenth, Seventeenth, and Nineteenth Amendments shows that this conception of political equality belongs to a bygone day, and should not be considered in determining what the Equal Protection Clause of the Fourteenth Amendment requires in statewide elections.

Accordingly the District Court as already noted [FN9] held that use of the county unit system in counting the votes ***378** in a statewide election was permissible 'if the disparity against any county is not in excess of the disparity that exists against any state in the most recent electoral college allocation.' 203 F.Supp., at 170. Moreover the District Court held that use of the county unit system in counting the votes in a statewide election was permissible 'if the disparity against any county is not in excess of the disparity that exists * * * under the equal proportions formula for representation of the

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several states in the Congress.' Ibid. The assumption implicit in these conclusions is that since equality is not inherent in the electoral college and since precise equality among blocs of votes in one State or in the several States when it comes to the election of members of the House of Representatives is never possible, precise equality is not necessary in statewide elections.

FN9. See note 5, supra.

[6] We think the analogies to the electoral college, to districting and redistricting, and to other phases of the problems of representation in state or federal legislatures or conventions [FN10] are inapposite. The inclusion of the electoral college in the Constitution, as the result of specific historical concerns, [FN11] validated the collegiate principle despite its inherent numerical inequality, but implied nothing about the use of an analogous system by a State in a statewide election. No such specific accommodation of the latter was ever undertaken, and therefore no validation of its numerical inequality ensued. Nor does the question here have anything to do with the composition of the state or federal legislature. And we intimate no opinion on the constitutional phases of that problem beyond what we said in Baker v. Carr, supra. The present case is only a voting case. Cf. ***379**Nixon v. Herndon, 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759; ****808**Nixon v. Condon, 286 U.S. 73. 52 S.Ct. 484, 76 L.Ed. 984; Smith v. Allwright, supra. Georgia gives every qualified voter one vote in a statewide election; but in counting those votes she employs the county unit system which in end result weights the rural vote more heavily than the urban vote and weights some small rural counties heavier than other larger rural counties.

FN10. We do not reach here the questions that would be presented were the convention system used for nominating candidates in lieu of the primary system.

FN11. See note 8, supra.

[7][8] States can within limits specify the qualifications of voters in both state and federal elections; the Constitution indeed makes voters' qualifications rest on state law even in federal elections. Art. I, s 2. As we held in Lassiter v. Northampton County Election Board, 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072, a State may if it chooses require voters to pass literacy tests, provided of course that literacy is not used as a cloak to discriminate against one class or group. But we need not determine all the limitations that are placed on this power of a State to determine the qualifications of voters, for appellee, is a qualified voter.

[9] The Fifteenth Amendment prohibits a State from denying or abridging a Negro's right to vote. The Nineteenth Amendment does the same for women. If a State in a statewide election weighted the male vote more heavily than the female vote or the white vote more heavily than the Negro vote, none could successfully contend that that discrimination was allowable. See Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152. How then can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote--whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of ***380** 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.

[10][11][12][13][14] The Court has consistently recognized that all qualified voters have a constitutionally protected right 'to cast their ballots and have them counted at Congressional elections.' United States v. Classic, 313 U.S. 299, 315, 61 S.Ct. 1031, 1037, 85 L.Ed. 1368; see Ex parte Yarbrough, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274; Wiley v. Sinkler, 179 U.S. 58, 21 S.Ct. 17, 45 L.Ed. 84; Swafford v. Templeton, 185 U.S. 487, 22 S.Ct. 783, 46 L.Ed. 1005. Every voter's vote is entitled to be counted once. It must be correctly counted and reported. As stated in United States v. Mosley, 238 U.S. 383, 386, 35 S.Ct. 904, 905, 59

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L.Ed. 1355, 'the right to have one's vote counted' has the same dignity as 'the right to put a ballot in a box.' It can be protected from the diluting effect of illegal ballots. Ex parte Siebold, 100 U.S. 371, 25 L.Ed. 717; United States v. Saylor, 322 U.S. 385, 64 S.Ct. 1101, 88 L.Ed. 1341. And these rights must be recognized in any preliminary election that in fact determines the true weight a vote will have. See United States v. Classic, supra; Smith v. Allwright, supra. The concept of political equality in the voting booth contained in the Fifteenth Amendment extends to all phases of state elections, see Terry v. Adams, supra; and, as previously noted, there is no indication in the Constitution that homesite or occupation affords a permissible basis for distinguishing between qualified voters within the State.

[15][16][17] The only weighting of votes sanctioned by the Constitution concerns matters of representation, such as the allocation of Senators irrespective of population and the use of the electoral college in the choice of a President. Yet ****809** when Senators are chosen, the Seventeenth Amendment states the choice must be made 'by the people.' Minors, felons, and other classes may be excluded. See ***381** Lassiter v. Northampton County Election Board, supra, 360 U.S. p. 51, 79 S.Ct. p. 990. But once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded. As we stated in Gomillion v. Lightfoot, supra, 364 U.S. p. 347, 81 S.Ct. p. 130:

> 'When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.'

The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing--one person, one vote.

[18][19] While we agree with the District Court on most phases of the case and think it was right in enjoining the use of the county unit system [FN12] in tabulating the votes, we vacate its judgment and remand the case so that a decree in conformity with our opinion may be entered.

> FN12. The county unit system, even in its amended form (see note 3, supra) would allow the candidate winning the popular vote in the county to have the entire unit vote of that county. Hence the weighting of votes would continue, even if unit votes were allocated strictly in proportion to population. Thus if a candidate won 6,000 of 10,000 votes in a particular county, he would get the entire unit vote, the 4,000 other votes for a different candidate being worth nothing and being counted only for the purpose of being discarded.

It is so ordered.

Judgment vacated and case remanded.

Mr. Justice STEWART, whom Mr. Justice CLARK joins, concurring.

In joining the opinion and judgment of the Court, I emphasize what--but for my Brother HARLAN'S dissent--I should have thought would be apparent to all who read the Court's opinion. This case does not involve the ***382** validity of a State's apportionment of geographic constituencies from which representatives to the State's legislative assembly are chosen, nor any of the problems under the Equal Protection Clause which such litigation would present. We do not deal here with 'the basic ground rules implementing Baker v. Carr.' This case, on the contrary, involves statewide elections of a United States Senator and of state executive and judicial officers responsible to a statewide constituency. Within a given constituency, there can be room for but a single constitutional rule--one voter, one vote. United States v. Classic, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368.

Mr. Justice HARLAN, dissenting.

When Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663, was argued at the last Term we were assured that if this Court would only remove the roadblocks of Colegrove v. Green, 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432, and its predecessors to judicial review in 'electoral' cases, this Court in all likelihood would never have to get deeper into such

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matters. State legislatures, it was predicted, would be prodded into taking satisfactory action by the mere prospect of legal proceedings.

These predictions have not proved true. As of November 1, 1962, the apportionment of seats in at least 30 state legislatures had been challenged in state and federal courts, [FN1] and, besides this one, 10 electoral cases of one kind or another are ****810** already on this Court's docket. [FN2] The present case is the first of these to reach plenary consideration.

FN1. Advisory Commission on Intergovernmental Relations, Report on Apportionment of State Legislatures, December 1962, p. A--21. I have been informed by the Administrative Office of the United States Courts that, by December 31, 1962, over 25 suits had been filed in the federal courts alone.

FN2. No. 460, WMCA, Inc., v. Simon; No. 507, Wesberry v. Sanders; No. 508, Reynolds v. Sims; No. 517, Beadle v. Scholle; No. 540, Vann v. Frink; No. 554, Maryland Comm. for Fair Representation v. Tawes; No. 610, McConnell v. Frink; No. 688, Price v. Moss; No. 689, Oklahoma Farm Bureau v. Moss; No. 797, Davis v. Mann.

***383** Preliminarily, it is symptomatic of the swift pace of current constitutional adjudication that the majority opinion should have failed to mention any of the four occasions on which Georgia's County Unit System has previously been unsuccessfully challenged in this Court. Cook v. Fortson, decided with Turman v. Duckworth, 329 U.S. 675, 67 S.Ct. 21, 91 L.Ed. 596 (1946); South v. Peters, 339 U.S. 276, 70 S.Ct. 641, 94 L.Ed. 834 (1950); Cox v. Peters, 342 U.S. 936, 72 S.Ct. 559, 96 L.Ed. 697 (1952); and Hartsfield v. Sloan, 357 U.S. 916, 78 S.Ct. 1363, 2 L.Ed.2d 1363 (1958).

It is true that none of these cases reached the stage of full plenary consideration but, in light of the judicial history recounted by Mr. Justice Frankfurter in his dissenting opinion in Baker v. Carr, supra, 82 S.Ct. at 266, 278, 82 S.Ct. at 737, 743 et seq., only the guileless could fail to recognize that the prevailing view then was that the validity of this County Unit System was not open to serious constitutional doubt. [FN3] This estimate of the earlier situation is highlighted by the dissenting opinion of Justices BLACK and DOUGLAS in South v. Peters, supra, 339 U.S. at 277, 70 S.Ct. at 642, in which they unsuccessfully espoused the very views which now become the law. Presumably my two Brothers also reflected these same views in noting their dissents in the Cox and Hartsfield cases. See also Cook v. Fortson, etc., supra, in which Mr. Justice BLACK also noted his dissent.

FN3. Although the Solicitor General, as amicus, suggests that the Court's action in South v. Peters rested simply on a refusal to exercise federal equity power, it should be noted that the first case cited in the Court's per curiam affirmance is MacDougall v. Green, 335 U.S. 281, 69 S.Ct. 1, 93 L.Ed. 3. See infra, p. 811.

But even if the Court's present silence about these cases can be deemed justified on the premise that their summary disposition can be satisfactorily accounted for on grounds not involving the merits, I consider today's decision not supportable.

***384** In the context of a nominating primary respecting candidates for statewide office, the Court construes the Equal Protection Clause of the Fourteenth Amendment as requiring that each person's vote be given equal weight. The majority says: 'The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing--one person, one vote.' Ante, p. 809. The Court then strikes down Georgia's County Unit System as such, a holding which the District Court declined to make. 203 F.Supp., at 170.

The Court's holding surely flies in the face of history. For, as impressively shown by the opinion of Frankfurter, J., in Baker v. Carr, 369 U.S., at 301--324, 82 S.Ct., at 755--767, 'one person, one vote' has never been the universally accepted political philosophy in England, the American Colonies, or in the United States. The significance of this historical fact seems indeed to be recognized by the Court, for it implies that its newfound

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formula might not obtain in a case involving the apportionment of seats in the 'State Legislature or for the Federal House of Representatives.' Ante, p. 806.

But, independently of other reasons that will be discussed in a moment, any such distinction finds persuasive refutation in the Federal Electoral College whereby the President of the United States is chosen on principles wholly opposed to those now held constitutionally ****811** required in the electoral process for statewide office. One need not close his eyes to the circumstance that the Electoral College was born in compromise, nor take sides in the various attempts that have been made to change the system, [FN4] in order to agree with the court below that it 'could ***385** hardly be said that such a system used in a state among its counties, assuming rationality and absence of arbitrariness in end result, could be termed invidious.' 203 F.Supp., at 169.

> FN4. See Wechsler, Presidential Elections and the Constitution: A Comment on Proposed Amendment, 35 A.B.A.J. 181 (1949).

Indeed this Court itself some 15 years ago rejected, in a comparable situation, the notion of political equality now pronounced. In MacDougall v. Green, 335 U.S. 281, 69 S.Ct. 1, challenge was made to an Illinois law requiring that nominating petitions of a new political party be signed by at least 25,000 voters, including a minimum of 200 voters from each of at least 50 of the 102 counties in the State. The claim was that the '200 requirement' made it possible for 'the voters of the less populous counties * * * to block the nomination of candidates whose support is confined to geographically limited areas.' Id., at 283, 69 S.Ct. at 2. In disallowing this claim, the Court said (id., at 283--284, 69 S.Ct. at 2):

> 'To assume that political power is a function exclusively of numbers is to disregard the practicalities of government. Thus, the Constitution protects the interests of the smaller against the greater by giving in the Senate entirely unequal representation to populations. It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former. The Constitution--a practical instrument of government--makes no such demands on the States.'

Certainly no support for this equal protection doctrine can be drawn from the Fifteenth, Seventeenth, or ***386** Nineteenth Amendment. The Fifteenth Amendment simply assures that the right to vote shall not be impaired 'on account of race, color, or previous condition of servitude.' The Seventeenth Amendment provides that Senators shall be 'elected by the people,' with no indication that all people must be accorded a vote of equal weight. The Nineteenth Amendment merely gives the vote to women. And it is hard to take seriously the argument that 'dilution' of a vote in consequence of a legislatively sanctioned electoral system can, without more, be analogized to an impairment of the political franchise by ballot box stuffing or other criminal activity, e.g., United States v. Mosley, 238 U.S. 383, 35 S.Ct. 904, 59 L.Ed. 1355; United States v. Classic, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368; United States v. Saylor, 322 U.S. 385, 64 S.Ct. 1101, 88 L.Ed. 1341, or to the disenfranchisement of qualified voters on purely racial grounds, Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110.

A violation of the Equal Protection Clause thus cannot be found in the mere circumstance that the Georgia County Unit System results in disproportionate vote weighting. It 'is important for this court to avoid extracting from the very general language of the 14th Amendment a system of delusive exactness * * *.' Louisville & Nashville R. Co. v. Barber Asphalt Co., 197 U.S. 430, 434, 25 S.Ct. 466, 467, 49 L.Ed. 819 (Holmes, J.). ****812** What then remains of the equal protection claim in this case?

At the core of Georgia's diffusion of voting strength which favors the small as against the large counties is the urban-rural problem, so familiar in the American political scene. In my dissent in Baker v. Carr, 369 U.S., at 336, 82 S.Ct., at 774, I expressed the view that a State might rationally

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conclude that its general welfare was best served by apportioning more seats in the legislature to agricultural communities than to urban centers, lest the legitimate interests of the former be submerged in the stronger electoral voice of the latter. In my opinion, recognition of the same factor cannot be deemed irrational in the present situation ***387** even though all of the considerations supporting its use in a legislative apportionment case are not present here.

Given the undeniably powerful influence of a state governor on law and policy making, [FN5] I do not see how it can be deemed irrational for a State to conclude that a candidate for such office should not be one whose choice lies with the numerically superior electoral strength of urban voters. By like token, I cannot consider it irrational for Georgia to apply its County Unit System to the selection of candidates for other statewide offices [FN6] in order to assure against a predominantly 'city point of view' in the administration of the State's affairs.

FN5. The Georgia Constitution vests in the Governor the State's 'executive power,' and authorizes him to recommend legislation, make reports to and call extraordinary sessions of the State General Assembly, issue writs of election to fill vacancies in the General Assembly, veto or approve bills and resolutions, and require reports from the various departments of the State. Ga.Const. of 1945, Art. V, ss 2--3001 to 2--3017. Also, by statute, payments cannot be made from the state treasury without a warrant issued by the Governor, Ga.Code Ann., s 40-- 204, and in the event of a public emergency the Governor is authorized to promulgate and enforce such rules and regulations as are necessary to prevent, control, or quell violence, threatened or actual, Ga.Code Ann., s 40--213.

FN6. Those involved in this case, besides Governor, are United States Senator, Lieutenant Governor, Secretary of State, Justice of the Supreme Court, Judge of the Court of Appeals, Attorney General, Comptroller General, Commissioner of Labor, and Treasurer. The Governor has a general power to fill vacancies in such offices, unless otherwise provided by law. Ga.Const. of 1945, Art. V, s 1, par. 13, s 2--3013.

On the existing record, this leaves the question of 'irrationality' in this case to be judged on the basis of pure arithmetic. The Court by its 'one person, one vote' theory in effect avoids facing up to that problem, but the District Court did face it, holding that the disparities in voting strength between the largest county (Fulton) and the four smallest counties (Webster, Glascock, Quitman, and Echols), running respectively 8 to 1, 10 to 1, 11 to 1, ***388** and 14 to 1 in favor of the latter, [FN7] were invidiously discriminatory. But it did not tell us why. I do not understand how, on the basis of these mere numbers, unilluminated as they ****813** are by any of the complex and subtle political factors involved, a court of law can say, except by judicial fiat, that these disparities are in themselves constitutionally invidious.

FN7.

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County	Population	Unit Vote	Population per Unit Vote	Ratio to Fulton County
Fulton	556,326	40	13,908	
DeKalb	256,782	20	12,839	
Chatham	188,299	16	11,760	
Muscogee	158,623	14	11,330	
Webster	3,247	2	1,623	8 to 1
Glascock	2,672	2	1,336	10 to 1
Quitman	2,432	2	1,216	11 to 1
Echols	1,876	2	938	14 to 1

The disproportions in the Georgia County Unit System are indeed not greatly out of line with those existing under the Electoral College count for the Presidency. The disparity in population per Electoral College vote between New York (the largest State in the 1960 census) and Alaska (the smallest) was about 5 to 1. [FN8] There are only 15 Georgia counties, out of a total of 159, which have a greater disparity per unit vote, and of these 15 counties 4 have disparity of less than 6 to 1. It is thus apparent that a slight modification of the Georgia plan could bring it within the tolerance permitted in the federal scheme.

FN8. Statistical Abstract of the United States 10,366 (1962).

It was of course imponderables like these that lay at the root of the Court's steadfast pre-Baker v. Carr refusal 'to enter (the) political thicket.' Colegrove v. Green, supra, 328 U.S. at 556, 66 S.Ct. at 1201. Having turned its back on this wise chapter in its history, the Court, in my view, can no longer escape the necessity of coming to grips with the thorny problems it so studiously strove to avoid in Baker v. Carr ***389** (see concurring opinion of STEWART, J., 369 U.S., at 265, 82 S.Ct., at 736, and dissenting opinion of HARLAN, J., id., at 339, 82 S.Ct. at 775) and in two subsequent cases, Scholle v. Hare, 369 U.S. 429, 430, 82 S.Ct. 910, 8 L.Ed.2d 1 (concurring opinion of CLARK, J., and STEWART, J.), 430--435, 82 S.Ct. 910--913 (dissenting opinion of HARLAN, J.); W.M.C.A., Inc., v. Simon, 370 U.S. 190, 191--194, 82 S.Ct. 1234, 1235--1236, 8 L.Ed.2d 430 (dissenting opinion of HARLAN, J.). To regard this case as being outside the general stream of electoral cases because only two other States, Maryland and Mississippi, have county unit systems, is to hide one's head in the sand.

What then should be the test of 'rationality' in this judicially unfamiliar field? My Brother CLARK has perhaps given us a clue in the legislative inactivity--absence of any other remedy--crazy quilt approach contained in his concurring opinion in Baker v. Carr, supra, at 369 U.S. 253-262, 82 S.Ct. 729--734. But I think a formulation of the basic ground rules in this untrod area of judicial competence should await a fully developed record. This case is here at an interlocutory stage. The temporary injunction before us issued upon a record consisting only of the pleading, answers to interrogatories, affidavits, statistical material, and what the lower court described as a 'liberal use of our right to take judicial notice of matters of common knowledge and public concern.' 203 F.Supp., at 160, n. 1. No full-dress exploration of any of the many intricate questions involved in establishing criteria for judging 'rationality' took place, the opinion and decree below issued the day following the hearing, and the District Court observed that, while its standards of equal protection (which this Court now puts aside) 'may appear doctrinaire to some extent,' it was constrained to act as it did because of the then (but no longer existing) [FN9] urgency of the situation. 203 F.Supp., at 170.

FN9. Following the District Court's

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injunction, a statewide direct primary was held.

***390** Surely, if the Court's 'one person, one vote' ideology is constitutionally untenable, as I think it clearly is, the basic ground rules implementing Baker v. Carr should await the trial of this or some other case in which we have before us a fully developed record. Only then can we know what we are doing. Cf. White Motor Co. v. United States, 372 U.S. 253, 83 S.Ct. 696. A matter which so profoundly touches the barriers between federal judicial and state legislative authority demands nothing less.

I would vacate the judgment of the District Court and remand the case for trial.

372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821

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99 S.Ct. 983
440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230
(Cite as: 440 U.S. 173, 99 S.Ct. 983)

Briefs and Other Related Documents

Supreme Court of the United States

ILLINOIS STATE BOARD OF ELECTIONS,
Appellant,
v.
SOCIALIST WORKERS PARTY et al.

No. 77-1248.

Argued Nov. 6, 1978.
Decided Feb. 22, 1979.

The United States District Court for the Northern District of Illinois, 433 F.Supp. 11, permanently enjoined the Chicago Board of Election Commissioners from enforcing a statute which required nominating petitions for new political parties and independent candidates seeking office serving less than the entire state to contain more than 25,000 signatures. On appeal, the Court of Appeals for the Seventh Circuit, 566 F.2d 586, ruled, inter alia, that the permanent injunction was properly issued. On appeal, the Supreme Court, Mr. Justice Marshall, held that the Illinois Election Code, insofar as it requires independent candidates and new political parties to obtain more than 25,000 signatures in Chicago, is unconstitutional.

Affirmed.

Mr. Justice Blackmun filed concurring opinion.

Mr. Chief Justice Burger concurred in judgment.

Mr. Justice Rehnquist filed opinion concurring in judgment.

Mr. Justice Stevens filed opinion concurring in part and concurring in judgment.

West Headnotes

[1] Courts ⇨107
106k107 Most Cited Cases
Summary affirmances have considerably less precedential value than an opinion on the merits.

[2] Courts ⇨107
106k107 Most Cited Cases
Precedential effect of summary affirmance can extend no farther than precise issues presented and necessarily decided by those actions.

[3] Courts ⇨107
106k107 Most Cited Cases
Summary disposition affirms only judgment of court below and no more may be read into court's action than was essential to sustain judgment; questions which "merely lurk in the record" are not resolved and no resolution of them may be inferred.

[4] Constitutional Law ⇨91
92k91 Most Cited Cases
[4] Elections ⇨22
144k22 Most Cited Cases
Restrictions on access to ballot burden two distinct and fundamental rights, the right of individuals to associate for advancement of political beliefs and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.

[5] Constitutional Law ⇨91
92k91 Most Cited Cases
[5] Elections ⇨22
144k22 Most Cited Cases
When such fundamental rights as freedom to associate as a political party and right to cast votes effectively are at stake, State must establish that its regulation of ballot is necessary to serve compelling interest. U.S.C.A.Const. Amend. 14.

[6] Elections ⇨22
144k22 Most Cited Cases
Requirement that states adopt least drastic means to achieve ends is particularly important where restrictions on access to ballot are involved. U.S.C.A.Const. Amend. 14.

[7] Constitutional Law ⇨225.2(3.1)
92k225.2(3.1) Most Cited Cases
(Formerly 92k225.2(3))
[7] Elections ⇨22
144k22 Most Cited Cases
Illinois Election Code is unconstitutional insofar as

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it requires independent candidates and new political parties to obtain more than 25,000 signatures to appear on ballot in Chicago, 25,000 signatures being the number required to achieve place on ballot in statewide election. Ill.Rev.Stat.1978 Supp. ch. 46, §§ 10-2, 10-3; U.S.C.A.Const. Amends. 1, 14.

[8] Federal Courts ⇐451
170Bk451 Most Cited Cases
Court of Appeals properly dismissed as moot a claim that Chicago Board of Election Commissioners lacked authority to conclude settlement agreement with respect to unresolved issue whether 5% signature requirement coupled with filing deadline impermissibly burdened First and Fourteenth Amendment rights where no evidence created reasonable expectation that Board would repeat its purportedly unauthorized actions in subsequent actions. Ill.Rev.Stat.1978 Supp. ch. 46, §§ 10-2, 10-3; U.S.C.A.Const. Amends. 1, 14.

***984 *173 Syllabus** [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Under the Illinois Election Code, new political parties and independent candidates must obtain the signatures of 25,000 qualified voters in order to appear on the ballot in statewide elections. However, the minimum number of signatures required in elections for offices of political subdivisions of the State is 5% of the number of persons who voted at the previous election for such offices. Application of these provisions to a special mayoral election in Chicago produced the result that a new party or independent candidate needed substantially more signatures than would be needed for ballot access in a statewide election. In actions by appellees, an independent candidate, two new political parties, and certain voters challenging this discrepancy on equal protection grounds, the District Court enjoined enforcement of the 5% provision insofar as it mandated more than 25,000 signatures, and the Court of Appeals affirmed. *Held:*

1. This Court's summary affirmance in *Jackson v. Ogilvie*, 403 U.S. 925, 91 S.Ct. 2247, 29 L.Ed.2d 705, of the District Court's decision in 325 F.Supp. 864, upholding Illinois' 5% signature requirement is not dispositive of the equal protection question presented here. The precedential effect of **985 a summary affirmance can extend no further than "the precise issues presented and necessarily decided by those actions," *Mandel v. Bradley*, 432 U.S. 173, 176, 97 S.Ct. 2238, 2240, 53 L.Ed.2d 199. In contrast to this case, the challenge in *Jackson* involved only the discrepancy between the 5% requirement and the less stringent requirements for candidates of established political parties. The issue presented here was not referred to by the *Jackson* District Court, and was mentioned only in passing in the jurisdictional statement subsequently filed with this Court. Thus, the issue was not adequately presented to, or decided by, this Court in its summary affirmance. Pp. 988-990.

2. The Illinois Election Code, insofar as it requires independent candidates and new political parties to obtain more than 25,000 signatures in Chicago violates the Equal Protection Clause of the Fourteenth Amendment. Pp. 990- 992.

*174 (a) When such fundamental rights as the freedom to associate as a political party and the right to cast votes effectively are at stake, a State must establish that its regulation of ballot access is necessary to serve a compelling interest. Pp. 990-991.

(b) "[E]ven when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty," *Kusper v. Pontikes*, 414 U.S. 51, 59, 94 S.Ct. 303, 308, 38 L.Ed.2d 260, and States must adopt the least drastic means to achieve their ends. This requirement is particularly important where restrictions on access to the ballot are involved. Since the State has determined that a smaller number of signatures in a larger political unit adequately serves its interest in regulating the number of candidates on the ballot, the signature requirements for independent candidates and political parties seeking offices in Chicago are clearly not the least restrictive means of achieving the same objective. Appellant State Board of Elections has advanced no reason, much less a compelling one, why the State needs a more

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stringent requirement for elections in Chicago than for statewide elections. Pp. 991-992.

(c) Prior invalidation of Illinois' rules regarding geographic distribution of signatures tied the requirements for both city and state candidates solely to a population standard. However, while this may explain the anomaly at issue here, it does not justify it. Historical accident, without more, cannot constitute a compelling state interest. Pp. 991-992.

3. The Court of Appeals properly dismissed as moot appellant's claim that the Chicago Board of Election Commissioners lacked authority to conclude a settlement agreement with respect to the unresolved issue whether the 5% signature requirement coupled with the filing deadline impermissibly burdened First and Fourteenth Amendment rights. Appellant has presented no evidence creating a reasonable expectation that the Chicago Board will repeat its purportedly unauthorized actions in subsequent elections. P. 992.

566 F.2d 586, affirmed.

***175** Michael L. Levinson, Springfield, Ill., for appellant.

Jeffrey D. Colman, Chicago, Ill., and Ronald Reosti, Detroit, Mich., for appellees.

Mr. Justice MARSHALL delivered the opinion of the Court.

Under the Illinois Election Code, new political parties and independent candidates must obtain the signatures of 25,000 qualified voters in order to appear on the ballot in statewide elections. [FN1] However, a different ****986** standard applies in elections ***176** for offices of political subdivisions of the State. The minimum number of signatures required for those elections is 5% of the number of persons who voted at the previous election for offices of the particular subdivision. [FN2] In the city of Chicago, application of this standard has produced the incongruous ***177** result that a new party or an independent candidate needs substantially more signatures to gain access to the ballot than a similarly situated party or candidate for statewide office. [FN3] The question before us is whether this discrepancy violates the Equal Protection Clause of the Fourteenth Amendment.

FN1. Under Ill.Ann.Stat., ch. 46, § 10-2 (Supp.1978):
"A political party which, at the last general election for State and county officers, polled for its candidate for Governor more than 5% of the entire vote cast for Governor, is hereby declared to be an 'established political party' as to the State and as to any district or political subdivision thereof.
"A political party which, at the last election in any congressional district, legislative district, county, township, school district, park district, municipality or other district or political subdivision of the State, polled more than 5% of the entire vote cast within such congressional district, legislative district, county, township, school district, park district, municipality, or political subdivision of the State, where such district, political subdivision or municipality, as the case may be, has voted as a unit for the election of officers to serve the respective territorial area of such district, political subdivision or municipality, is hereby declared to be an 'established political party' within the meaning of this Article as to such district, political subdivision or municipality."
A *new* political party is one that has not met these requirements.
Individuals desiring to form a new political party throughout the State must file with the State Board of Elections a petition that, *inter alia*, is "signed by not less than 25,000 qualified voters." In *Communist Party of Illinois v. State Board of Elections* , 518 F.2d 517 (C.A.7), cert. denied, 423 U.S. 986, 96 S.Ct. 394, 46 L.Ed.2d 303 (1975), the Court of Appeals held unconstitutional the proviso in this section requiring "that no more than 13,000 signatures from the same county may be counted toward the required total of 25,000 signatures." Ill.Ann.Stat., ch. 46, § 10-2 (Supp.1978).
A party that files a completed petition

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becomes entitled to place "upon the ballot at such next ensuing election such list of . . . candidates for offices to be voted for throughout the State . . . under the name of and as the candidates of such new political party." *Ibid.*

With respect to independent candidates, § 10-3 (Supp.1978) provides in pertinent part:

"Nomination of independent candidates (not candidates of any political party), for any office to be filled by the voters of the State at large may also be made by nomination papers signed in the aggregate for each candidate by not less than 25,000 qualified voters of the State; Provided, however, that no more than 13,000 signatures from the same county may be counted toward the required total of 25,000 signatures."

The record does not reveal whether the State enforces the proviso.

FN2. Section 10-2 provides:

"If such new political party shall be formed for any district or political subdivision less than the entire State, such petition shall be signed by qualified voters equaling in number not less than 5% of the number of voters who voted at the next preceding general election in such district or political subdivision in which such district or political subdivision voted as a unit for the election of officers to serve its respective territorial area."

Under § 10-3:

"Nominations of independent candidates for public office within any district or political subdivision less than the State, may be made by nomination papers signed in the aggregate for each candidate by qualified voters of such district, or political division, equaling not less than 5%, nor more than 8% (or 50 more than the minimum, whichever is greater) of the number of persons, who voted at the next preceding general election in such district or political subdivision in which such district or political subdivision voted as a unit for the election of officers to serve its respective territorial area."

FN3. Candidates and new parties in Cook County, Ill., which is more populous than Chicago, would also have to obtain more than 25,000 signatures. In all political subdivisions of the State other than Chicago and Cook County, the 5% standard requires fewer than 25,000 signatures. Tr. of Oral Arg. 20.

I

In January 1977, the Chicago City Council ordered a special mayoral election to be held on June 7, 1977, to fill the vacancy created by the death of Mayor Richard J. Daley. Pursuant to that order, the Chicago Board of Election Commissioners (Chicago Board) issued an election calendar that listed the filing dates and signature requirements applicable to independent candidates and new political parties. Independent candidates had to obtain 35,947 valid signatures by February 19, and new political parties were required to file petitions with 63,373 valid signatures by April 4. [FN4] Subsequently, the Chicago Board and the State ****987** Board of Elections (State Board) agreed for purposes of the special election to bring into conformity the requirements for independent candidates ***178** and new parties. The filing deadline for independents was extended to April 4, and the signature requirement for new parties was reduced to 35,947.

FN4. This disparity in the signature requirements arose because the State and Chicago Boards used voting figures from the April 1, 1975, elections in computing the requirements for independents, but used figures from the November 2, 1976, general election in their calculations for new parties. The pertinent statutory language regarding signature requirements for independent candidates, however, is identical to that for new parties. Compare Ill.Ann.Stat., ch. 46, § 10-3 (Supp.1978), with § 10-2.

Section 10-6 of the Election Code provides that nominating petitions for independents and new parties must be filed at least 64 days prior to the election, here, by April 4.

The record does not reflect what caused the discrepancy in filing dates in this case.

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Because they had received less than 5% of the votes cast in the last mayoral election, the Socialist Workers Party and United States Labor Party were new political parties as defined in the Illinois statute. See n. 1, *supra.* Along with Gerald Rose, a candidate unaffiliated with any party, they were therefore subject to the signature requirements and filing deadlines specified in the election calendar.

On January 24, 1977, the Socialist Workers Party and two voters who supported its candidate for Mayor brought this action against the Chicago Board and the State Board to enjoin enforcement of the signature requirements and filing deadlines for new parties. [FN5] One week later, Gerald Rose, the United States Labor Party, and four voters sued the Chicago Board, challenging the restrictions on new parties and independent candidates. The State Board intervened as a defendant pursuant to 28 U.S.C. § 2403, and the District Court consolidated the two cases for trial.

FN5. The Chicago Board is responsible for accepting nominating petitions for candidates and preparing the ballots for special elections. Ill.Ann.Stat., ch. 46, §§ 7-60, 7-62, 10-6 (Supp.1978). It also has "charge of and make[s] provisions for all elections, general, special, local, municipal, state and county, and all others of every description to be held in such city or any part thereof, at any time." § 6-26 (Supp.1978). The State Board exercises "general supervision over the administration of the registration and election laws throughout the State." § 1A-1 (Supp.1978); Ill.Const., Art. 3, § 5.

Plaintiff-appellees contended at trial that the discrepancy between the requirements for state and city elections violated the Equal Protection Clause. They argued further that the restrictions on independent candidates and new parties were unconstitutionally burdensome in the context of a special election because of the short time for collection of signatures between notice of the election and the filing deadline. The ***179** Chicago Board's primary response was that the decision in *Jackson v. Ogilvie*, 325 F.Supp. 864 (N.D.Ill.), summarily aff'd 403 U.S. 925, 91 S.Ct. 2247, 29 L.Ed.2d 705 (1971), upholding Illinois' 5% signature requirement, foreclosed the constitutional challenge in this case. [FN6]

FN6. Although the State Board was afforded notice and an opportunity to participate in the District Court proceedings, only the Chicago Board appeared for argument on plaintiff-appellees' motion for a permanent injunction. After the court entered the injunction, the State Board moved to vacate the decision, advancing many of the grounds previously asserted by the Chicago Board.

Only the State Board has appealed to this Court. The Chicago Board, defending its settlement agreement, see *infra*, at 988, appears as an appellee. Subsequent references to the "appellees" in this opinion, however, will include only the plaintiff-appellees.

In an opinion issued on March 14, 1977, the District Court determined that *Jackson* addressed neither the circumstances of a special election nor the disparity between state and city signature requirements at issue here. *Socialist Workers Party v. Chicago Bd. of Election Comm'rs*, 433 F.Supp. 11, 16-17, 19. On the merits of appellees' equal protection challenge, the court found

"[no] rational reason why a petition with identical signatures can satisfy the legitimate state interests for restricting ballot access in state elections, and yet fail to do the same in a lesser unit. *Lendall v. Jernigan*, 424 F.Supp. 951 (E.D.Ark.1977). ****988** Any greater requirement than 25,000 signatures cannot be said to be the least drastic means of accomplishing the state's goals, and must be found to unduly impinge [on] the constitutional rights of independents, new political parties, and their adherents." *Id.*, at 20 (footnote omitted).

Accordingly, the District Court permanently enjoined the enforcement of the 5% provision insofar as it mandated more than 25,000 signatures, the number required for statewide elections. The court also declined to dismiss appellees' claim ***180** that the April 4 filing deadline coupled with the signature requirement impermissibly burdened First and Fourteenth Amendment rights, but it postponed a decision on this issue pending submission of additional evidence to justify the selection of that

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date.

On March 17, 1977, the Chicago Board and the appellees concluded a settlement agreement with respect to the unresolved issues. The agreement was incorporated into an order entered the same day which provided that "solely as applied to the Special Mayoral Election to be held in Chicago on June 7, 1977," the signature requirement would be reduced to 20,000 and the filing deadline extended to April 18. App. 74. The District Court denied the State Board's subsequent motion to vacate both orders.

The State Board, but not the Chicago Board, appealed from both the March 14 order and the March 17 order. In a *per curiam* decision rendered six months after the election, the Court of Appeals for the Seventh Circuit adopted the opinion of the District Court. 566 F.2d 586, 587 (1977). Also, with respect to the March 17 order, the Court of Appeals dismissed as moot the State Board's contention that the Chicago Board lacked authority to conclude a settlement agreement without prior state approval. In so ruling, the court noted that the settlement order applied only to the June 7 election, which had long passed, and held that the question of the Chicago Board's authority for its actions was not "capable of repetition, yet evading review," *Id.*, at 588, quoting *DeFunis v. Odegaard*, 416 U.S. 312, 318-319, 94 S.Ct. 1704, 1706-1707, 40 L.Ed.2d 164 (1974).

We noted probable jurisdiction, 435 U.S. 994, 98 S.Ct. 1644, 56 L.Ed.2d 82 (1978), and we now affirm.

II

[1] Appellant argues here, as it did below, that this Court's summary affirmance of *Jackson v. Ogilvie, supra*, is dispositive of the equal protection challenge here. In analyzing this contention, we note at the outset that summary affirmances have considerably less precedential value than an opinion on ***181** the merits. See *Edelman v. Jordan*, 415 U.S. 651, 671, 94 S.Ct. 1347, 1359, 39 L.Ed.2d 662 (1974). As Mr. Chief Justice BURGER observed in *Fusari v. Steinberg*, 419 U.S. 379, 392, 95 S.Ct. 533, 541, 42 L.Ed.2d 521 (1975) (concurring opinion), "upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established." See *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 14, 96 S.Ct. 2882, 2891, 49 L.Ed.2d 752 (1976).

Moreover, we agree with the District Court's conclusion that *Jackson* does not govern the issues currently before us. In that case, the Reverend Jesse Jackson, an independent candidate for Mayor of Chicago, attacked the 5% signature requirement for independent candidates as an impermissible burden on the exercise of First Amendment rights. He contended as well that the discrepancy between the 5% rule and the less stringent requirements for candidates of established political parties violated the Equal Protection Clause. A three-judge District Court rejected both claims, finding the 5% requirement reasonable and the burdens imposed on independent and established party candidates roughly equivalent. Appellees mount a different challenge. They do not attack the lines drawn between independent and established party candidates. Rather, their equal protection claim rests on the discrimination ****989** between those independent candidates and new parties seeking access to the ballot in statewide elections and those similarly situated candidates and parties seeking access in city elections.

Appellant urges, however, that even though the District Court in *Jackson* did not explicitly mention the equal protection issue presented here, the issue was raised in a memorandum supporting Jackson filed with the District Court by the State. In the course of arguing that the election law discriminated against independent candidates, the memorandum stated:

> "It must also be remembered that it is even more difficult for an independent candidate to obtain signatures than ***182** it would be for an independent party. Yet a whole new State political party needs only 25,000 signatures throughout the entire State for state officers, (Section 10-2), while a single independent candidate for only the office of Mayor of Chicago, needs almost 60,000 signatures. This also is an invidious discrimination against one seeking the office of Mayor of Chicago." Memorandum of Law, App. to Juris. Statement in *Jackson v. Ogilvie,*, O.T.1970, No. 70-1341, p.

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B-23. [FN7]

FN7. Appellees Rose and the United States Labor Party argue that even this statement does not present the issue now before the Court. In their view, it refers to the purported disparity between the treatment of independent candidates and that of new political parties. In fact, appellees argue, there is and was no such disparity. Compare Ill.Ann.Stat., ch. 46, § 10-2 (Supp.1978), with § 10-3.

In view of the District Court's ultimate decision, appellant contends, this issue was necessarily resolved against Jackson, and therefore was resolved by this Court as well in its summary affirmance.

The District Court in *Jackson*, however, framed the equal protection issue before it as "whether [the 5% signature] requirement operates to discriminate against the plaintiff by depriving him of a right granted to candidates of established political parties." 325 F.Supp., at 868. The jurisdictional statement posed the question in similar terms. Juris. Statement in *Jackson v. Ogilvie*, O.T.1970, No. 70-1341, pp. 14-15. Although the jurisdictional statement alluded to the State's memorandum, *id.*, at 15, and incorporated it as a separate appendix, *id.*, at B-21--B-24, at no point did it directly address the question now before us.

[2][3] This omission disposes of appellant's argument. As we stated in *Mandel v. Bradley*, 432 U.S. 173, 176, 97 S.Ct. 2238, 2240, 53 L.Ed.2d 140 (1977), the precedential effect of a summary affirmance can extend no farther than "the precise issues presented and necessarily decided by those actions." A summary disposition affirms ***183** only the judgment of the court below, *ibid.*, quoting *Fusari v. Steinberg, supra*, 419 U.S., at 391- 392, 95 S.Ct., at 540-541 (BURGER, C. J., concurring), and no more may be read into our action than was essential to sustain that judgment. See *Usery v. Turner Elkhorn Mining Co., supra*, 424 U.S. at 14, 96 S.Ct. at 2891; *McCarthy v. Philadelphia Civil Service Comm'n*, 424 U.S. 645, 646, 96 S.Ct. 1154, 47 L.Ed.2d 366 (1976) (*per curiam*). Questions which "merely lurk in the record," *Webster v. Fall*, 266 U.S. 507, 511, 45 S.Ct. 148, 149, 69 L.Ed. 411 (1925), are not resolved, and no resolution of them may be inferred. Assuming that the State's memorandum in *Jackson* can be read as advancing the issue presented here, see n. 7, *supra*, the issue was by no means adequately presented to and necessarily decided by this Court. *Jackson* therefore has no effect on the constitutional claim advanced by appellees.

III

In determining whether the Illinois signature requirements for new parties and independent candidates as applied in the city of Chicago violate the Equal Protection Clause, we must examine the character of the classification in question, the importance of the individual interests at stake, and the state interests asserted in support of the classification. See ****990***Memorial Hospital v. Maricopa County*, 415 U.S. 250, 253-254, 94 S.Ct. 1076, 1079-1080, 39 L.Ed.2d 306 (1974); *Dunn v. Blumstein*, 405 U.S. 330, 335, 92 S.Ct. 995, 999, 31 L.Ed.2d 274 (1972); *Kramer v. Union School Dist.*, 395 U.S. 621, 626, 89 S.Ct. 1886, 1889, 23 L.Ed.2d 583 (1969); *Williams v. Rhodes*, 393 U.S. 23, 30, 89 S.Ct. 5, 10, 21 L.Ed.2d 24 (1968).

The provisions of the Illinois Election Code at issue incorporate a geographic classification. For purposes of setting the minimum-signature requirements, the Code distinguishes state candidates, political parties, and the voters supporting each, from city candidates, parties, and voters. In 1977, an independent candidate or a new political party in Chicago, a city with approximately 718,937 voters eligible to sign nominating petitions for the mayoral election in 1977, [FN8] had to ***184** secure over 10,000 more signatures on nominating petitions than an independent candidate or new party in state elections, who had a pool of approximately 4.5 million eligible voters from which to obtain signatures. [FN9] That the distinction between state and city elections undoubtedly is valid for some purposes does not resolve whether it is valid as applied here.

FN8. Chicago Board of Election Commissioners, Municipal Election Results (Apr. 1, 1975).

FN9. U. S. Dept. of Commerce, Bureau of

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the Census, Statistical Abstract of the United States 505 (1977).

[4] Restrictions on access to the ballot burden two distinct and fundamental rights, "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams v. Rhodes, supra,* 393 U.S. at 30, 89 S.Ct. at 10. The freedom to associate as a political party, a right we have recognized as fundamental, see 393 U.S., at 30-31, 89 S.Ct. at 10, has diminished practical value if the party can be kept off the ballot. Access restrictions also implicate the right to vote because absent recourse to referendums, "voters can assert their preferences only through candidates or parties or both." *Lubin v. Panish,* 415 U.S. 709, 716, 94 S.Ct. 1315, 1320, 39 L.Ed.2d 702 (1974). By limiting the choices available to voters, the State impairs the voters' ability to express their political preferences. And . for reasons too self-evident to warrant amplification here, we have often reiterated that voting is of the most fundamental significance under our constitutional structure. *Wesberry v. Sanders,* 376 U.S. 1, 17, 84 S.Ct. 526, 534, 11 L.Ed.2d 481 (1964); *Reynolds v. Sims,* 377 U.S. 533, 555, 84 S.Ct. 1362, 1378, 12 L.Ed.2d 506 (1964); *Dunn v. Blumstein, supra,* 405 U.S. at 336, 92 S.Ct. at 999.

[5] When such vital individual rights are at stake, a State must establish that its classification is necessary to serve a compelling interest. *American Party of Texas v. White,* 415 U.S. 767, 780-781, 94 S.Ct. 1296, 1305-1306, 39 L.Ed.2d 744 (1974); *Storer v. Brown,* 415 U.S. 724, 736, 94 .S.Ct. 1274, 1282, 39 L.Ed.2d 714 (1974); *Williams v. Rhodes, supra,* 393 U.S. at 31, 89 S.Ct. at 10. To be sure, the Court has previously acknowledged that States have a ***185** legitimate interest in regulating the number of candidates on the ballot. In *Lubin v. Panish, supra,* 415 U.S. at 715, 94 S.Ct. at 1319, we observed:

> "A procedure inviting or permitting every citizen to present himself to the voters on the ballot without some means of measuring the seriousness of the candidate's desire and motivation would make rational voter choices more difficult because of the size of the ballot and hence would tend to impede the electoral process. . . . The means of testing the seriousness of a given candidacy may be open to debate; the fundamental importance of ballots of reasonable size limited to serious candidates with some prospects of public support is not."

Similarly, in *Bullock v. Carter,* 405 U.S. 134, 145, 92 S.Ct. 849, 857, 31 L.Ed.2d 92 (1972) (footnote omitted), the Court expressed concern for the States' need to assure that the winner of an election "is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden ****991** of runoff elections." Consequently, we have upheld properly drawn statutes that require a preliminary showing of a "significant modicum of support" before a candidate or party may appear on the ballot. *Jenness v. Fortson,* 403 U.S. 431, 442, 91 S.Ct. 1970, 1976, 29 L.Ed.2d 554 (1971); see, *e. g., American Party of Texas v. White, supra.*

[6] However, our previous opinions have also emphasized that "even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty," *Kusper v. Pontikes,* 414 U.S. 51, 58-59, 94 S.Ct. 303, 308, 38 L.Ed.2d 260 (1973), and we have required that States adopt the least drastic means to achieve their ends. *Lubin v. Panish, supra,* 415 U.S. at 716, 94 S.Ct. at 1320; *Williams v. Rhodes, supra,* 393 U.S. at 31-33, 89 S.Ct. at 10-11. This requirement is particularly important where restrictions on access to the ballot are involved. The States' interest in screening out frivolous candidates must be considered in light of the significant role that third parties have played in the political development of the Nation. Abolitionists, Progressives, . and Populists have undeniably had influence, if not always electoral ***186** success. As the records of such parties demonstrate, an election campaign is a means of disseminating ideas as well as attaining political office. See A. Bickel, Reform and Continuity 79-80 (1971); W. Binkley, American Political Parties 181-205 (3d ed. 1959); H. Penniman, Sait's American Political Parties and Elections 223-239 (5th ed. 1952). Overbroad restrictions on ballot access jeopardize this form of political expression.

The signature requirements for independent candidates and new political parties seeking offices in Chicago are plainly not the least restrictive means of protecting the State's objectives. The Illinois

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Legislature has determined that its interest in avoiding overloaded ballots in statewide elections is served by the 25,000-signature requirement. Yet appellant has advanced no reason, much less a compelling one, why the State needs a more stringent requirement for Chicago. At oral argument, appellant explained that the signature provisions for statewide elections originally reflected a different approach than those for elections in political subdivisions. Tr. of Oral Arg. 35-37. Not only were independent candidates and new political parties in state elections required to obtain 25,000 signatures, but those signatures also had to meet standards pertaining to geographic distribution. By comparison, candidates and parties in city elections had only to obtain signatures from a flat percentage of the qualified voters. In *Moore v. Ogilvie,* 394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969), this Court struck down on equal protection grounds Illinois' requirement that the nominating petition of a candidate for statewide office include the signatures of at least 200 qualified voters from at least 50 counties. Following *Moore,* the Court of Appeals for the Seventh Circuit invalidated a provision in the amended statute which specified that no more than 13,000 signatures on a new party's petition for statewide elections could come from any one county. *Communist Party of Illinois v. State Board of Elections,* 518 F.2d 517, cert. denied, ***187** 423 U.S. 986, 96 S.Ct. 394, 46 L.Ed.2d 303 (1975). Thus, appellant noted, the invalidation of the geographic constraints has tied the requirements for both city and state candidates solely to a population standard, giving rise to the anomaly at issue here.

[7] Although this account may explain the anomaly, appellant still has suggested no reasons that justify its continuation. Historical accident, without more, cannot constitute a compelling state interest. We therefore hold that the Illinois Election Code is unconstitutional insofar as it requires independent candidates and new political parties to obtain more than 25,000 signatures in Chicago.

IV

Appellant finally challenges the Court of Appeals' disposition of its appeal from the March 17 settlement order. The court dismissed ****992** as moot appellant's claim that the Chicago Board lacked authority to conclude a settlement agreement without the State's consent. In appellant's view, the court erred in not placing this claim within the exception to the mootness doctrine for cases that are "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC,* 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911).

[8] In *Weinstein v. Bradford,* 423 U.S. 147, 149, 96 S.Ct. 347, 349, 46 L.Ed.2d 350 (1975), we elaborated on this exception, holding that a case is not moot when:

> "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again."

Although the first branch of the test is satisfied here, appellant has presented no evidence creating a reasonable expectation that the Chicago Board will repeat its purportedly unauthorized actions in subsequent elections. Appellant's conclusory assertions that the actions are capable of repetition ***188** are not sufficient to satisfy the *Weinstein* test, particularly since appellant does not contend that the Chicago Board has ever attempted previously to conclude litigation without its approval. The Chicago Board's entry into a settlement agreement reflected neither a policy it had determined to continue, cf. *United States v. New York Telephone Co.,* 434 U.S. 159, 165 n. 6, 98 S.Ct. 364, 368, 54 L.Ed.2d 376 (1977), nor even a consistent pattern of behavior, cf. *SEC v. Sloan,* 436 U.S. 103, 109-110, 98 S.Ct. 1702, 1707, 56 L.Ed.2d 148 (1978). And the Chicago Board's action patently was not a matter of statutory prescription, as was the case in other election decisions on which appellant relies, *e. g., Storer v. Brown,* 415 U.S., at 737 n. 8, 94 S.Ct., at 1282; *Moore v. Ogilvie, supra,* 394 U.S. at 816, 89 S.Ct. at 1494. We therefore find that appellant's challenge was properly dismissed as moot.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

THE CHIEF JUSTICE concurs in the judgment.

Mr. Justice BLACKMUN, concurring.

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Although I join the Court's opinion and its strict-scrutiny approach for election cases, I add these comments to record purposefully, and perhaps somewhat belatedly, my unrelieved discomfort with what seems to be a continuing tendency in this Court to use as tests such easy phrases as "compelling [state] interest" and "least drastic [or restrictive] means." See, *ante*, at 990, 991, and 992. I have never been able fully to appreciate just what a "compelling state interest" is. If it means "convincingly controlling," or "incapable of being overcome" upon any balancing process, then, of course, the test merely announces an inevitable result, and the test is no test at all. And, for me, "least drastic means" is a slippery slope and also the signal of the result the Court has chosen to reach. A judge would be unimaginative indeed if he could not come up with something a little less "drastic" or a little less "restrictive" in almost any situation, and thereby enable himself to ***189** vote to strike legislation down. This is reminiscent of the Court's indulgence, a few decades ago, in substantive due process in the economic area as a means of nullification.

I feel, therefore, and have always felt, that these phrases are really not very helpful for constitutional analysis. They are too convenient and result oriented, and I must endeavor to disassociate myself from them. Apart from their use, however, the result the Court reaches here is the correct one. It is with these reservations that I join the Court's opinion.

***190** Mr. Justice REHNQUIST, concurring in the judgment.

I concur in the judgment of the Court, but I cannot join its opinion: It employs an elaborate analysis where a very simple one ****993** would suffice. The disparity between the state and city signature requirements does not make sense, and this Court is intimately familiar with the reasons why.

In 1968, Illinois had a coherent set of petition requirements for obtaining a place on the ballot. In order to appear on the ballot in a county or city election, it was necessary for independent candidates and new political parties to obtain voter signatures equal in number to 5% of the voters who voted in the political subdivision at the last general election. Requirements for statewide office put greater emphasis on geographical balance: Independent candidates and new political parties needed 25,000 signatures, and at least 200 signatures had to be obtained from each of 50 counties within the State. Thus, a candidate for statewide office at that time could get on the ballot with fewer signatures than a candidate for office in Cook County, but he was also subject to special restrictions. It was reasonable for Illinois to conclude that this scheme best vindicated its interest in "protect[ing] the integrity of its political processes from frivolous or fraudulent candidacies." *Bullock v. Carter*, 405 U.S. 134, 145, 92 S.Ct. 849, 857, 31 L.Ed.2d 92 (1972). Cook County is not Illinois, and all the State asked was that candidates and political parties interested in statewide office produce this minimal evidence of statewide support.

In 1969, this Court held that the 200 voters per county requirement violated the Equal Protection Clause because different ***191** counties had different populations. *Moore v. Ogilvie*, 394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969). That decision led to a holding by the Seventh Circuit that the statute, as amended by the legislature after *Moore* to place a 13,000- signature limit on new political party signatures from any one county, was likewise a denial of equal protection. *Communist Party of Illinois v. State Board of Elections*, 518 F.2d 517 (C.A.7), cert. denied, 423 U.S. 986, 96 S.Ct. 394, 46 L.Ed.2d 303 (1975).

The courts having knocked out key panels in an otherwise symmetrical mosaic, it is not surprising that little sense can be made of what is left. Given this history, I cannot subscribe to my Brother STEVENS' alternative characterization of Illinois' problem as "a malfunction of the legislative process." The legislature enacted a comprehensive Election Code, and amended it once in response to a decision of this Court. The attorneys for the State Board of Elections are now placed in the position of having to defend a law which is but a truncated version of the original enactment.

All of this explains the disparate treatment of statewide and Chicago candidates; it does not justify it under any rational-basis test, and appellant has scarcely made any effort to do so before this Court. In the light of this history, and without

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engaging in any elaborate analysis which pretends that we are dealing with the considered product of a legislature, I would hold that the disparate treatment bears no rational relationship to any state interest.

***189** Mr. Justice STEVENS, concurring in part and concurring in the judgment.

Placing additional names on a ballot adds to the cost of conducting elections and tends to confuse voters. The State therefore has a valid interest in limiting access to the ballot to serious candidates. If that interest is adequately served by a 25,000-signature requirement in a statewide election, the same interest cannot justify a larger requirement in a smaller election.

Nonetheless, I am not sure that the disparity evidences a violation of the Equal Protection Clause. The constitutional requirement that Illinois govern impartially would be implicated by a rule that discriminates, for example, between Socialists and Republicans or between Catholics and Protestants. But I question whether it has any application to rules prescribing different qualifications for different political offices. Rather than deciding that question, I would simply hold that legislation imposing a significant interference with access to the ****994** ballot must rest on a rational predicate. This legislative remnant is without any such support. It is either a product of a malfunction of the legislative process or merely a by-product of this Court's decision in *Moore v. Ogilvie*, 394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed.2d 1, see*ante*, at 993 (REHNQUIST, J., concurring in judgment). In either event, I believe it has deprived appellees of their liberty without the "due process of lawmaking" that the ***190** Fourteenth Amendment requires. Cf. *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 98, 97 S.Ct. 911, 925, 51 L.Ed.2d 173 (STEVENS, J., dissenting).

For these reasons I concur in the Court's judgment and in Parts I, II, and IV of its opinion.

440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230

Briefs and Other Related Documents (Back to top)

- 1978 WL 207226 (Appellate Brief) Reply Brief of Appellant the Illinois State Board of Elections (Nov. 01, 1978)

- 1978 WL 207224 (Appellate Brief) Brief of Appellees Gerald Rose, U.S. Labor Party, et al. (Aug. 28, 1978)

- 1978 WL 207220 (Appellate Brief) Brief of Appellants (Jun. 29, 1978)

- 1977 WL 189933 (Appellate Brief) Brief of Appellee -- Socialist Workers' Party, et al. (Oct. Term 1977)

- 1977 WL 189934 (Appellate Brief) Brief of Appellee--Chicago Board of Election Commissioners. (Oct. Term 1977)

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94 S.Ct. 303
414 U.S. 51, 94 S.Ct. 303, 38 L.Ed.2d 260
(Cite as: 414 U.S. 51, 94 S.Ct. 303)

Supreme Court of the United States

Stanley T. KUSPER, Jr., et al., Appellants,
v.
Harriet G. PONTIKES.

No. 71--1631.

Argued Oct. 9, 1973.
Decided Nov. 19, 1973.

A voter brought action attacking constitutionality of Illinois statute prohibiting a person from voting at primary if he has voted at primary of another political party within preceding 23 calendar months. From a judgment of the United States District Court, Northern District of Illinois, Eastern Division, 345 F.Supp. 1104, the defendants appealed. The Supreme Court, Mr. Justice Stewart, held, inter alia, that the district court properly declined to abstain from deciding the constitutional validity of the statute, and that the statute infringes upon the right of free political association protected by the First and Fourteenth Amendments.

Affirmed.

Mr. Chief Justice Burger concurred in the result.

Mr. Justice Blackmun dissented and filed an opinion. Mr. Justice Rehnquist, with whom Mr. Justice Blackmun joined, dissented and filed an opinion.

West Headnotes

[1] Federal Courts ⇦41
170Bk41 Most Cited Cases
(Formerly 106k260.4)
"Abstention" is a judge-made doctrine that sanctions escape from immediate decision only in narrowly limited special circumstances justifying the delay and expense to which application of the doctrine inevitably gives rise.

[2] Federal Courts ⇦42
170Bk42 Most Cited Cases
(Formerly 106k260.4)
The paradigm of the "special circumstances" that make abstention appropriate is a case where the challenged state statute is susceptible of a construction by the state judiciary that avoid or modify the necessity of reaching a federal constitutional question; abstention in such circumstances not only serves to minimize federal-state friction, but also avoids premature and perhaps unnecessary constitutional adjudication.

[3] Federal Courts ⇦46
170Bk46 Most Cited Cases
(Formerly 106k260.4)
The doctrine of abstention contemplates that deference to state court adjudication only be made when the issue of state law is uncertain, but where it cannot be fairly concluded that the underlying state statute is susceptible of an interpretation that might avoid the necessity for constitutional adjudication, abstention would amount to shirking the solemn responsibility of the federal court to guard, enforce, and protect every right granted or secured by the Constitution of the United States.

[4] Federal Courts ⇦52
170Bk52 Most Cited Cases
(Formerly 106k260.4)
District court was not required to abstain from adjudicating constitutionality of Illinois statute prohibiting person from voting in primary if he has voted in primary of another political party within preceding 23 calendar months on ground that the Republican primary election in which voter, who sought to vote in subsequent Democratic primary, involved only nominations for city offices and that state courts might interpret the Republican primary to have been one of a "political party within a city * * * only" and thus outside purview of the 23 months' rule, in view of decision of the Illinois Supreme Court that the kind of "local" primaries that are outside the 23 months' rule are simply those of purely city political parties, and both Democratic and Republican parties are entitled in Illinois to make nominations not only for city offices, but for congressional, state, and county offices as well.

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S.H.A.Ill. ch. 46, §§ 7- 2, 7-43(d).

[5] Constitutional Law ⇐91
92k91 Most Cited Cases
[5] Constitutional Law ⇐274.1(1)
92k274.1(1) Most Cited Cases
Freedom to associate with others for the common advancement of political beliefs and ideas is a form of "orderly group activity" protected by the First and Fourteenth Amendments; the right to associate with the political party of one's choice is an integral part of this basic constitutional freedom. U.S.C.A.Const. Amends. 1, 14.

[6] Elections ⇐5
144k5 Most Cited Cases
Administration of the electoral process is a matter that the Constitution largely entrusts to the states, but, in exercising their powers of supervision over elections and in setting qualifications for voters, the states may not infringe upon basic constitutional protections. U.S.C.A.Const. Amends. 1, 14.

[7] Constitutional Law ⇐91
92k91 Most Cited Cases
[7] Constitutional Law ⇐274.2(3)
92k274.2(3) Most Cited Cases
(Formerly 92k274.1(1), 92k274.1(.1))
[7] Elections ⇐5
144k5 Most Cited Cases
Unduly restrictive state election laws may so impinge upon freedom of association as to run afoul of the First and Fourteenth Amendments. U.S.C.A.Const. Amends. 1, 14.

[8] Constitutional Law ⇐91
92k91 Most Cited Cases
(Formerly 92k1)
A significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest, for even when pursuing a legitimate interest, a state may not choose means that necessarily restrict constitutionally protected liberty. U.S.C.A.Const. Amends. 1, 14.

[9] Constitutional Law ⇐83(1)
92k83(1) Most Cited Cases
If the state has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties. U.S.C.A.Const. Amends. 1, 14.

[10] Constitutional Law ⇐91
92k91 Most Cited Cases
[10] Elections ⇐18
144k18 Most Cited Cases
Illinois statute prohibiting person from voting in primary if he has voted in primary of another political party within preceding 23 calendar months unconstitutionally infringes upon the right of free political association, as against contention that the 23-months rule serves purpose of preventing "raiding"--the practice whereby voters in sympathy with one party vote in another's primary in order to distort that primary's results, since the statute "locks" voters into a preexisting party affiliation from one primary to the next, and the only way to break the "lock" is to forego voting in any primary for a period of almost two years. S.H.A.Ill. ch. 46, § 7-43(d); U.S.C.A.Const. Amends. 1, 14.

***51 **304** Syllabus [FN*]

> FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Appellee, a qualified Chicago voter who voted in a February 1971 Republican primary involving nominations for municipal officers, challenges the constitutionality of s 7--43(d) of the Illinois Election Code, under which she was barred from voting in a March 1972 Democratic primary. Section 7--43(d) prohibits a person from voting in the primary election of a political party if he has voted in the primary of any other party within the preceding 23 months, an exception being made if the primary is of a 'political party within a city . . . only.' Appellants contended, inter alia, that the three-judge District Court, which held the three-judge District should have abstained because the state courts might have found the statutory exception applicable to the 1971 primary. Held:

1. The District Court did not err in declining to abstain from making a constitutional ruling in view of an Illinois Supreme Court adjudication confining the statutory exception to political parties entitled to nominate only for city offices and making it inapplicable to the Democratic and Republican parties. Appellee is thus not relieved of the bar of the 23-month rule. Pp. 305--307.

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****305** 2. Section 7--43(d) unconstitutionally infringes upon the right of free political association protected by the First and Fourteenth Amendments by 'locking' the voter in his pre-existing party affiliation for a substantial period of time following his participation in any primary election, and the State's legitimate interest in preventing party 'raiding' cannot justify the substantial restraint of the 23-month rule. Rosario v. Rockefeller, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1, distinguished. Pp. 307--310.

345 F.Supp. 1104, affirmed.

***52** Aldus S. Mitchell, Jr., Chicago, Ill., for appellants.

Ray Jeffrey Cohen, Chicago, Ill., for appellee.

Mr. Justice STEWART delivered the opinion of the Court.

Under s 7--43(d) of the Illinois Election Code, a person is prohibited from voting in the primary election of a political party if he has voted in the primary of any other party within the preceding 23 months. [FN1] Appellee, Harriet G. Pontikes, is a qualified Chicago voter who voted in a Republican primary in February 1971; [FN2] she wanted to vote in a March 1972 Democratic primary, but was barred from doing so by this 23-month ***53** rule. [FN3] She filed a complaint for declaratory and injunctive relief in the United States District Court for the Northern District of Illinois, alleging that s 7--43(d) unconstitutionally abridged her freedom to associate with the political party of her choice by depriving her of the opportunity to vote in the Democratic primary. A statutory three-judge court was convened, [FN4] and held, one judge dissenting, that the 23-month rule is unconstitutional. 345 F.Supp. 1104. [FN5] We noted probable judiction of this appeal from that judgment. 411 U.S. 915, 93 S.Ct. 1540, 36 L.Ed.2d 306. [FN6]

FN1. Ill.Rev.Stat., c. 46, s 7--43 provides, in pertinent part:
'No person shall be entitled to vote at a primary:
'(d) If he has voted at a primary held under this Article 7 of another political party within a period of 23 calendar months next preceding the calendar month in which such primary is held: Provided, participation by a primary elector in a primary of a political party which, under the provisions of Section 7--2 of this Article, is a political party within a city, village or incorporated town or town only and entitled hereunder to make nominations of candidates for city, village or incorporated town or town offices only, and for no other office or offices, shall not disqualify such primary elector from participating in other primaries of his party: And, provided, that no qualified voter shall be precluded from participating in the primary of any purely city, village or incorporated town or town political party under the provisions of Section 7--2 of this Article by reason of such voter having voted at the primary of another political party within a period of 23 calendar months next preceding the calendar month in which he seeks to participate in held.'

FN2. The Republican primary in which the appellee voted involved nominations for the offices of mayor, city clerk, and city treasurer of Chicago.

FN3. The March 1972 Democratic primary involved, inter alia, nominations for Governor, United States Senator, United States Representative, state legislators, county officers, and delegates to the National Convention of the Democratic Party.

FN4. 28 U.S.C. ss 2281, 2284.

FN5. The District Court upheld the constitutional validity of Ill.Rev.Stat., c. 46, ss 7--43(a) and 7--44, which require a declaration of party affiliation as a prerequisite to voting in a primary election. This holding, which was unanimous, has not been appealed.

FN6. This case was consolidated in the District Court with a similar action brought by two other voters against the county

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clerk of Lake County, Illinois. The defendant in that case has not appealed from the District Court's judgment.

I

At the outset, we are met by the appellants' [FN7] argument that the District ****306** Court should have abstained from adjudicating the constitutionality of the 23-month rule. They base this argument upon that portion of s 7--43(d) which provides that:

FN7. The appellants in this case are members of the Chicago Board of Election Commissioners, who are responsible for administering the provisions of the Illinois Election Code within the city. See Ill.Rev.Stat., c. 46, s 6--21 et seq.

'(P)articipation by a primary elector in a primary of a political party which, under the provisions of Section 7--2 of this Article, is a political party within ***54** a city, village or incorporated town or town only and entitled hereunder to make nominations of candidates for city, village or incorporated town or town offices only, and for no other office or offices, shall not disqualify such primary elector from participating in other primaries of his party . . ..' Ill.Rev.Stat., c. 46, s 7--43(d).

The appellants note that the February 1971 Republican primary election in which Mrs. Pontikes voted involved only nominations for the offices of mayor, city clerk, and city treasurer of the city of Chicago. They claim that the state courts might interpret this 1971 primary to have been one of a 'political party within a city . . . only,' and thus outside the purview of the 23-month rule.

[1] As we stated in Lake Carriers' Assn. v. MacMullan, 406 U.S. 498, 509, 92 S.Ct. 1749, 1756, 32 L.Ed.2d 257:

'Abstention is a 'judge-made doctrine . . ., first fashioned in 1941 in Railroad Commission v. Pullman Co., 312 U.S. 496 (61 S.Ct. 643, 85 L.Ed. 971), (that) sanctions . . . escape (from immediate decision) only in narrowly limited 'special circumstances,' Propper v. Clark, 337 U.S. 472, 492 (69 S.Ct. 1333, 1344, 93 L.Ed. 1480),' Zwickler v. Koota, 389 U.S. 241, 248 (88 S.Ct. 391, 395, 19 L.Ed.2d 444) (1967), justifying 'the delay and expense to which application of the abstention doctrine inevitably gives rise.' England v. (Louisiana State Board of) Medical Examiners, 375 U.S. 411, 418 (84 S.Ct. 461, 466, 11 L.Ed.2d 440) (1964).' [FN8]

FN8. Bracketed material in original.

[2][3] The paradigm of the 'special circumstances' that make abstention appropriate is a case where the challenged state statute is susceptible of a construction by the state judiciary that would avoid or modify the necessity of reaching a federal constitutional question. Zwickler v. Koota, 389 U.S. 241, 249, 88 S.Ct. 391, 396, 19 L.Ed.2d 444; Harrison v. NAACP, 360 U.S. 167, 176--177, 79 S.Ct. 1025, 1030, 3 L.Ed.2d 1152. Abstention in such ***55** circumstances not only serves to minimize federal-state friction, but also avoids premature and perhaps unnecessary constitutional adjudication. Harman v. Forssenius, 380 U.S. 528, 534, 85 S.Ct. 1177, 1181, 14 L.Ed.2d 50. But the doctrine of abstention 'contemplates that deference to state court adjudication only be made where the issue of state law is uncertain.' Ibid., 85 S.Ct., at 1182. Where, on the other hand, it cannot be fairly concluded that the underlying state statute is susceptible of an interpretation that might avoid the necessity for constitutional adjudication, abstention would amount to shirking the solemn responsibility of the federal courts to 'guard, enforce, and protect every right granted or secured by the constitution of the United States,' Robb v. Connolly, 111 U.S. 624, 637, 4 S.Ct. 544, 551, 28 L.Ed. 542.

[4] We think that the Illinois statute involved in this case is not fairly susceptible of a reading that would avoid the necessity of constitutional adjudication. The appellants' argument--that the February 1971 Chicago Republican primary might be considered that of a 'political party within a city . . . only'--is foreclosed by the decision of the Illinois Supreme Court in ****307**Faherty v. Board of Election Comm'rs, 5 Ill.2d 519, 126 N.E.2d 235. That decision made it clear that the kind of 'local' primaries that are outside the scope of s 7--43(d) are simply those of "purely city . . . political part(ies)"--those parties entitled, under s 7--2 of the Illinois Election Code, to make nominations for city offices only. Id., at 524, 126 N.E.2d, at 238. [FN9]

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FN9. Ill.Rev.Stat., c. 46, s 7--2 defines the term 'political party' under Illinois law, and states the offices for which various types of political parties are entitled to make nominations. Under s 7--2, a party that garners more than 5% of the entire vote cast at a statewide general election is defined as a 'political party within the State,' and is entitled to make nominations for all state and county offices in the next succeeding primary. Similarly, a party that polls more than 5% of the entire vote cast at a municipal general election is defined as a 'political party within . . . (a) city,' and is entitled to make nominations for city elective positions at the next succeeding primary.
Under s 7--43(d), a 'political party within a city . . . only' is one that has qualified under s 7--2 to make only city nominations; in other words, a party that has polled more than 5% of the vote at the preceding municipal general election, but less than 5% of the vote at the preceding state-wide general election. Obviously, the Republican party, in whose 1971 Chicago primary the appellee voted, does not fit within this description.

***56** Since both the Democratic and Republican parties are, of course, entitled in Illinois to make nominations not only for city offices, but for congressional, state, and county offices as well, the Faherty court held that they were not within the statutory definition of 'city' parties. It follows then, that despite the fact that the February 1971 Republican primary in which the appellee voted involved only nominations for offices within the city of Chicago, Mrs. Pontikes was still clearly barred by the 23-month rule from voting in the March 1972 *Democratic primary*. [FN10] The District Court was thus wholly justified in declining to abstain from deciding the constitutional validity of the 23-month rule, and it is to that issue that we now turn.

FN10. It is true, as the appellants argue, that the plaintiff in Faherty v. Board of Election Comm'rs, 5 Ill.2d 519, 126 N.E.2d 235, wished to vote in a Chicago Democratic primary after having voted, within the past year, in a statewide Republican primary; thus, the factual setting in Faherty was precisely the converse of that here. This, however, is a distinction without a difference. The holding of Faherty was that Republican and Democratic primaries, even those involving only citywide offices, were not primaries of political parties 'within a city . . . only.' See n. 9, supra. Thus, these primaries are fully within the purview of the s 7--43(d) 23-month rule.

II

[5] There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group ***57** activity' protected by the First and Fourteenth Amendments. NAACP v. Button, 371 U.S. 415, 430, 8o S.Ct. 328, 336, 9 L.Ed.2d 405; Bates v. Little Rock, 361 U.S. 516, 522--523, 80 S.Ct. 412, 416, 4 L.Ed.2d 480; NAACP v. Alabama, 357 U.S. 449, 460--461, 78 S.Ct. 1163, 1171, 2 L.Ed.2d 1488. The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom. Williams v. Rhodes, 393 U.S. 23, 30, 89 S.Ct. 5, 10, 21 L.Ed.2d 24. Cf. United States v. Robel, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508.

[6][7] To be sure, administration of the electoral process is a matter that the Constitution largely entrusts to the States. [FN11] But, in exercising their powers of supervision over elections and in setting qualifications for voters, the States may not infringe upon basic constitutional protections. See, e.g., Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274; Kramer v. Union School District, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583; *Carrington* v. *Rash*, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675. As the Court made clear in Williams v. Rhodes, supra, unduly restrictive ****308** state election laws may so impinge upon freedom of association as to run afoul of the First and Fourteenth Amendments. 393 U.S., at 30, 89 S.Ct., at 10. And see id., at 35--41, 89 S.Ct., at 12--15 (Douglas, J., concurring); id., at 41--48, 89 S.Ct., at 15--19 (Harlan, J., concurring).

FN11. See Art. I, s 2; Art. II, s 1. With

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respect to elections to federal office, however, the Court has held that Congress has power to establish voter qualifications. Oregon v. Mitchell, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272.

There can be little doubt that s 7--43(d) substantially restricts an Illinois voter's freedom to change his political party affiliation. One who wishes to change his party registration must wait almost two years before his choice will be given effect. Moreover, he is forced to forgo participation in any primary elections occurring within the statutory 23-month hiatus. The effect of the Illinois statute is thus to 'lock' the voter into his pre-existing party affiliation for a substantial period of time following participation in any primary election, and each succeeding primary vote extends this period of confinement.

***58** The 23-month rule does not, of course, deprive those in the appellee's position of all opportunities to associate with the political party of their choice. But neither did the state attempts to compel disclosure of NAACP membership lists in Bates v. Little Rock and NAACP v. Alabama work a total restriction upon the freedom of the organization's members to associate with each other. Rather, the Court found in those cases that the statutes under attack constituted a 'substantial restraint' [FN12] and a 'significant interference' [FN13] with the exercise of the constitutionally protected right of free association.

FN12. NAACP v. Alabama, 357 U.S. 449, 462, 78 S.Ct. 1163, 1171, 2 L.Ed.2d 1488.

FN13. Bates v. Little Rock, 361 U.S. 516, 523, 80 S.Ct. 412, 416, 4 L.Ed.2d 480.

The same is true of s 7--43(d). While the Illinois statute did not absolutely preclude Mrs. Pontikes from associating with the Democratic party, it did absolutely preclude her from voting in that party's 1972 primary election. Under our political system, a basic function of a political party is to select the candidates for public office to be offered to the voters at general elections. A prime objective of most voters in associating themselves with a particular party must surely be to gain a voice in that selection process. By preventing the appellee from participating at all in Democratic primary elections during the statutory period, the Illinois statute deprived her of any voice in choosing the party's candidates, and thus substantially abridged her ability to associate effectively with the party of her choice.

III

[8][9] As our past decisions have made clear, a significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest. Bates v. Little Rock, supra, 361 U.S., at 524, 80 S.Ct., at 417; NAACP v. Alabama, supra, 357 U.S., at 463, 78 S.Ct., at 1172. For even when ***59** pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. Dunn v. Blumstein, 405 U.S., at 343, 92 S.Ct., at 1003. 'Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' NAACP v. Button, 371 U.S., at 438, 83 S.Ct., at 340. If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties. Shelton v. Tucker, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231.

The appellants here urge that the 23-month rule serves the purpose of preventing 'raiding'--the practice whereby voters in sympathy with one party vote in another's primary in order to distort that primary's results. It is said that our decision in Rosario v. Rockefeller, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1, recognized the state interest in inhibiting 'raiding,' and upheld the constitutional validity of legislation restricting a voter's freedom to change parties, enacted as a means of serving that interest.

****309** It is true, of course, that the Court found no constitutional infirmity in the New York delayed-enrollment statute [FN14] under review in Rosario. That law required a voter to enroll in the party of his choice at least 30 days before a general election in order to be eligible to vote in the next party primary, and thus prevented a change in party affiliation during the approximately 11 months between the deadline and the primary election. [FN15] It is also true that the Court recognized in

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Rosario that a State may have a legitimate interest in seeking to curtail 'raiding,' since that practice may ***60** affect the integrity of the electoral process. Id., at 761, 93 S.Ct., at 1251. But it does not follow from Rosario that the Illinois statutory procedures also pass muster under the Fourteenth Amendment, for the Illinois Election Code differs from the New York delayed-enrollment law in a number of important respects.

FN14. N.Y. Election Law s 186, McKinney's Consol.Laws, c. 100.

FN15. New York presidential primaries are held in June; thus, in presidential election years, the cutoff date prescribed by s 186 occurs about eight months before the primary. Rosario v. Rockefeller, 410 U.S. 752, 760, 93 S.Ct. 1245, 1251, 36 L.Ed.2d 1.

The New York statute at issue in Rosario did not prevent voters from participating in the party primary of their choice; it merely imposed a time limit on enrollment. Under the New York law, a person who wanted to vote in a different party primary every year was not precluded from doing so; he had only to meet the requirement of declaring his party allegiance 30 days before the preceding general election. The New York law did not have the consequence of 'locking' a voter into an unwanted party affiliation from one election to the next; any such confinement was merely the result of the elector's voluntary failure to take timely measures to enroll. Id., at 757--759, 93 S.Ct., at 1249. The Court therefore concluded that the New York delayed-enrollment law did not prevent voters 'from associating with the political party of their choice.' Id., at 762, 93 S.Ct., at 1252. And see id., at 758 and n. 8, 93 S.Ct., at 1250.

The basic difference in the Illinois law is obvious. Since the appellee here voted in the 1971 Republican primary, the state law absolutely precluded her from participating in the 1972 Democratic primary. Unlike the petitioners in Rosario, whose disenfranchisement was caused by their own failure to take timely measures to enroll, there was no action that Mrs. Pontikes could have taken to make herself eligible to vote in the 1972 Democratic primary. [FN16] The Illinois law, unlike that of ***61** New York, thus 'locks' voters into a pre-existing party affiliation from one primary to the next, and the only way to break the 'lock' is to forgo voting in any primary for a period of almost two years.

FN16. She could, of course, have made herself eligible to vote in the 1972 Democratic primary by forgoing participation in the 1971 Republican primary. But such a course would have prevented her from associating with the party of her choice in 1971, and thus in no way would have obviated the constitutional deficiencies inherent in the Illinois law.

In other words, while the Court held in Rosario that the New York delayedenrollment scheme did not prevent voters from exercising their constitutional freedom to associate with the political party of their choice, the Illinois 23-month rule clearly does just that. It follows that the legitimate interest of Illinois in preventing 'raiding' cannot justify the device it has chosen to effect its goal. For that device conspicuously infringes upon basic constitutional liberty. Far from supporting the validity of the Illinois legislation, the Court's decision in Rosario suggests that the asserted state interest can be attained by 'less drastic means,' which do not unnecessarily burden the exercise of constitutionally protected activity.

[10] We conclude, therefore, that s 7--43(d) of the Illinois Election Code unconstitutionally ****310** infringes upon the right of free political association protected by the First and Fourteenth Amendments. The judgment of the District Court is accordingly affirmed.

Affirmed.

THE CHIEF JUSTICE concurs in the result.

Mr. Justice BLACKMUN, dissenting.

The deprivation Mrs. Pontikes claims to have suffered, and which the Court today enshrouds with the mantle of unconstitutionality, is that she has been restrained by the Illinois statute from voting in one primary election of one party in the relatively minor context of a personal desire to undo an

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established party affiliation. Apart from this meager restraint, appellee Pontikes is *62 fully free to associate with the party of her varying choice. She is, and has been, completely free to vote as she chooses in any general election. And she was free to vote in the primary of the party with which she had affiliated and voted in the preceding primary.

It is important, I think--and deserving of repeated emphasis--to note that this very limited statutory restriction on the appellee's exercise of her franchise is triggered solely by her personal and voluntary decision. This being so, the Court's conclusion seems to me to dilute an important First Amendment concept the vitality of which, in the long run, necessarily will suffer from strained and artificial applications of this kind. The mere fact that a state statute lightly brushes upon the right to vote and the right of association, important as these are, should not automatically result in invalidation. Prior case law does not require a conclusion of invalidity where, as here, the intrusion is so minor. See McDonald v. Board of Election Comm'rs, 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969); Rosario v. Rockefeller, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973).

In nearly all the voting cases relied upon by the Court and by the appellee, the Court was faced with situations where the disqualification amounted to a direct disenfranchisement or a vote dilution suffered by a discrete class whose impediment, as so imposed, was the result of an involuntary condition not directly tied to the franchise. See, for example, Harper v. Virginia Board of Elections, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) (poll tax and wealth); Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (location); Cipriano v. City of Houma, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969) (property ownership); Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965) (military status). Cf. Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) (residence). In each of these cases there was a direct impairment of the ability of the affected class, without voluntary action, to participate in the electoral process. The level of intrusion was markedly significant.

*63 What is before us here is a fairly complex statutory structure designed by Illinois to protect the integrity of the ballot box and the party system. The interest asserted by the State is clearly a legitimate one. Rosario v. Rockefeller, 410 U.S., at 761, 93 S.Ct., at 1251; Dunn v. Blumstein, 405 U.S., at 345, 92 S.Ct., at 1004; Bullock v. Carter, 405 U.S. 134, 145, 92 S.Ct. 849, 857, 31 L.Ed.2d 92 (1972). And, it seems to me, means of the kind Illinois has employed are reasonably related to the fulfillment of that interest. The extent to which organized party raiding can disrupt, with unfortunate results, the orderly process of party primary balloting is, perhaps, open to reasonable differences of opinion. Indeed, in this case the parties have joined issue as to the precise degree of impact this practice has had in recent Illinois elections. Regardless of which factual version is to be credited, the legitimacy of the interest is unquestioned. With respect to a State like Illinois, where party regimentation on an extensive scale is legendary, the Court, in my view, should move cautiously **311 when it is tempted to pass judgment in terms of assuming that there is a better or a less drastic means by which the State is able to achieve its admittedly laudable and lawful purpose.

By resorting to a standard of rigid and strict review, and by indulging in what I fear is a departure from the appropriately deferential approach in Rosario, the Court places itself in the position of failing to give the States the elbow room they deserve and must possess if they are to formulate solutions for the many and particular problems confronting them that are associated with the preservation of the integrity of the franchise. Cf. Phoenix v. Kolodziejski, 399 U.S. 204, 90 S.Ct. 1990, 26 L.Ed.2d 523 (1970); Burns v. Fortson, 410 U.S. 686, 687, 93 S.Ct. 1209, 1210, 35 L.Ed.2d 633 (1973) (concurring opinion). Surely, at some point, the important interest of the State in protecting its entire electoral system outweighs a minor *64 and incidental burden that happens to fall on a few uniquely situated citizens.

The Illinois Legislature has determined that a rule precluding voting in the primaries of different parties in successive annual elections is a desirable and necessary means by which to preserve an otherwise vulnerable structure. In Rosario, 410 U.S., at 762, 93 S.Ct., at 1252, we applied a 'particularized legitimate purpose' standard to a similarly directed scheme and upheld the New York

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statute. As Mr. Justice REHNQUIST points out in his dissent, post, at 312, the degree of disenfranchisement resulting from the New York provision is potentially as great as, if not greater than, the Illinois provision challenged here. That case and this one, taken together, therefore, effect incongruous results. Not only is the actual disenfranchisement in this case no greater than that in Rosario, but the Illinois provision has a more rational relation to its purpose than does the New York provision. The New York statute specified an arbitrary time period prior to which it is assumed that organized party switching for raiding purposes will not occur. In contrast, Illinois chose not to employ a flat time limit that is by nature speculative and arbitrary; instead, it tied its disqualification directly to a significant event, namely, a vote in another party's last primary. Seemingly, the 23-month period was chosen so that the limitation would not extend back beyond the most recent primary. When primaries are held annually, the 23-month period amounts to no more than a one-year limitation, and in this respect the statute is drawn as narrowly as can be expected for a system that is tied to a prior primary vote rather than a designated time period. By tying the cut-off to a primary, the Illinois scheme seems directly designed to succeed in preventing organized crossovers, for it is highly unlikely that any significant number of party regulars would ever be instructed not to vote at all in ***65** one primary in order to subvert the next one that will not be held for another year.

Mr. Justice REHNQUIST also observes that the Illinois system does have the side effect of creating a per se exclusion for a few voters. It is this factor, apparently, that has caused the Court to seek to distinguish Rosario. In New York the disqualification occasioned by the time limit will have its impact, more often than not, upon those who have not been diligent. This, indeed, was the very situation in Rosario. The Illinois provision, on the other hand, affects only party switchers. And they clearly are the group most amenable to organized raiding. I do not agree that any marginal difference that may exist between the New York rule and the Illinois rule must have the effect of transforming a 'legitimate time limitation,' Rosario, 410 U.S., at 762, 93 S.Ct., at 1252, into an unconstitutional denial of freedom of association. This incongruity underscores what I believe to be the potential mischief that results from an easy and all-too-ready resort to a strict-scrutiny standard in election cases of this kind. To be sure, the line between constitutionality and unconstitutionality must be drawn somewhere. ****312** But I would not draw it short of what Illinois has done here.

Mr. Justice REHNQUIST, with whom Mr. Justice BLACKMUN joins, dissenting.

The Court decides that the Illinois rule disqualifying a person from voting in the primary of one political party if he has voted in the primary of another political party during the preceding 23 months imposes an impermissible burden on Illinois voters' exercise of their right of free political association. In so doing it distinguishes Rosario v. Rockefeller, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973), decided last Term. I find Rosario more difficult to distinguish than does the Court.

***66** Section 7--43 of the Illinois Election Code provides that every person eligible to register to vote is entitled to vote at primary elections; it goes on to set out a number of exceptions to that general entitlement, including both persons disqualified under the 23-month rule challenged in this case and persons disqualified because they refuse to declare a party affiliation. [FN1] Section 7--44 requires ***67** a primary voter to declare his party affiliation to the primary judges at the polling place; it further provides that, if challenged, the voter must establish his right to vote. [FN2] Section 7--45 requires a ****313** challenged voter to supply an affidavit, in a statutorily prescribed form, to establish that he is entitled to vote under s 7--43. The affidavit states, inter alia, that the affiant has not voted in the primary of any other political party within the forbidden 23-month period.

> FN1. Ill.Rev.Stat., c. 46, s 7--43, provides:
> 'Every person having resided in this State 6 months and in the precinct 30 days next preceding any primary therein who shall be a citizen of the United States above the age of 21 years, shall be entitled to vote at such primary.
> 'The following regulations shall be applicable to primaries:
> 'No person shall be entitled to vote at a

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primary:
'(a) Unless he declares his party affiliations as required by this Article;
'(b) Who shall have signed the petition for nomination of a candidate of any party with which he does not affiliate, when such candidate is to be voted for at the primary;
'(c) Who shall have signed the nominating papers of an independent candidate for any office for which office candidates for nomination are to be voted for at such primary; or
'(d) If he has voted at a primary held under this Article 7 of another political party within a period of 23 calendar months next preceding the calendar month is which such primary is held: Provided, participation by a primary elector in a primary of a political party which, under the provisions of Section 7--2 of this Article, is a political party within a city, village or incorporated town or town only and entitled hereunder to make nominations of candidates for city, village or incorporated town or town offices only, and for no other office or offices, shall not disqualify such primary elector from participating in other primaries of his party: And, provided, that no qualified voter shall be precluded from participating in the primary of any purely city, village or incorporated town or town political party under the provisions of Section 7--2 of this Article by reason of such voter having voted at the primary of another political party within a period of 23 calendar months next preceding the calendar month (in which such primary) in which he seeks to participate is held.
'(e) In cities, villages and incorporated towns having a board of election commissioners only voters registered as provided by Article 6 of this Act shall be entitled to vote at such primary. '(f) No person shall be entitled to vote at a primary unless he is registered under the provisions of Article 4, 5 or 6 of this Act, when his registration is required by any of said Articles to entitle him to vote at the election with reference to which the primary is held.'

FN2. Ill.Rev.Stat., c. 46, s 7--44 provides: 'Any person desiring to vote at a primary shall state his name, residence and party affiliation to the primary judges, one of whom shall thereupon announce the same in a distinct tone of voice, sufficiently loud to be heard by all persons in the polling place. When article 4, 5 or 6 is applicable the Certificate of Registered Voter therein prescribed shall be made and signed and the official poll record shall be made. If the person desiring to vote is not challenged, one of the primary judges shall give to him one, and only one, primary ballot of the political party with which he declares himself affiliated, on the back of which such primary judge shall endorse his initials in such manner that they may be seen when the primary ballot is properly folded. If the person desiring to vote is challenged he shall not receive a primary ballot from the primary judges until he shall have established his right to vote as hereinafter provided. No person who refuses to state his party affiliation shall be allowed to vote at a primary.'

The Illinois system of primary elections, unlike the New York system before the Court in Rosario, does not require a voter to have enrolled as a member of a party months in advance in order to be eligible to vote in that party's primary. Illinois provides instead for a declaration ***68** of party affiliation at the primary polling place. And Illinois, not surprisingly in view of its different primary system, has chosen another way to protect its interest in preventing 'raiding' than has New York. It is true, as the Court makes clear, that the Illinois rule requires a voter affiliated with one party to sit out primaries during a period of 23 months in order to effectuate a switch in affiliation to another party and qualify to vote in its primaries. In this respect Illinois' rule imposes a greater burden on its voters' associational freedom than does New York's, since in New York a sufficiently prescient and diligent voter can vote in a different party's primary every year. Of course, it cannot be said whether the Illinois appellee here underwent her change in party loyalty in time, and would have taken the necessary steps to enroll, had Illinois had New York's rule.

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On the other hand, Illinois' rule imposes a lesser burden on its previously unaffiliated voters than does New York's. Indeed, it imposes a lesser burden on any voter who has, for whatever reason, failed to vote in the primary of another party within the past 23 months. Such voters are not required to foresee their interest in the primary by eight or more months, as are New York voters under the rule upheld in Rosario. As a practical matter, a voter is not required to swear that he has not participated in the primary of another party as a condition of his right to vote unless he is challenged. In these respects the Illinois rule is more closely tailored to the State's interest in preventing 'raiding' than is the New York rule. Voters who have recently demonstrated loyalty to another party by voting in its primary, are more likely than those who have not to engage in 'raiding.' Moreover, challenges for violations of the 23-month rule are not likely to be made where no serious danger of 'raiding' is perceived.

***69** Both the Illinois rule struck down today and the New York rule upheld in Rosario restrict voters' freedom to associate with the political party of their choice. In both instances the State has sought to justify the restrictions as promoting the State's legitimate interest in preventing 'raiding.' While neither rule is perfectly fashioned to accomplish that and no other result, I cannot conclude that the Illinois rule imposes a significantly greater burden on the exercise of associational freedom than does the New York rule we upheld last Term in Rosario.

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85 S.Ct. 817
380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709
(Cite as: 380 U.S. 145, 85 S.Ct. 817)

Supreme Court of the United States

LOUISIANA et al., Appellants,
v.
UNITED STATES.

No. 67.

Argued Jan. 26 and 27, 1965.
Decided March 8, 1965.

Action brought by United States Attorney General against state of Louisiana under complaint charging that defendants, by following and enforcing unconstitutional state laws, denied Negro citizens the right to vote. A Three-Judge court of the United States District Court for the Eastern District of Louisiana, 225 F.Supp. 353, gave judgment to the United States, and defendants appealed. The Supreme Court, Mr. Justice Black, held that provisions of Louisiana Constitution and statutes which require voters to satisfy registrars of their ability to understand and give reasonable interpretation of any section of Federal or State Constitutions violated Constitution and specifically conflicted with prohibitions against discrimination in voting because of race found both in Fifteenth Amendment and in statute.

Affirmed.

West Headnotes

[1] Counties ⇐38
104k38 Most Cited Cases
(Formerly 144k12)
Evidence supported findings that voting registrars in 21 Louisiana parishes where invalid constitutional interpretation test was found to have been used in registration had exercised their broad powers to deprive otherwise qualified Negro citizens of right to vote and that existence of test was hurdle to voter qualification which deterred and would continue to deter Negroes from attempting to register. 28 U.S.C.A. § 2281; 42 U.S.C.A. § 1971(a, c); U.S.C.A.Const. Amends. 14, 15; LSA-Const. art. 8, § 1(c, d); LSA-R.S. 18:36.

[2] States ⇐193
360k193 Most Cited Cases
United States Attorney General has power to bring suit against state and its officials to protect voting rights of Negroes guaranteed by statute and constitutional amendments. U.S.C.A.Const. Amends. 14, 15; 42 U.S.C.A. § 1971(a).

[3] States ⇐203
360k203 Most Cited Cases
Members of state board of registration were properly made defendants to suit by United States charging that defendants, by enforcing unconstitutional state laws, denied vote to Negroes, over objection that board members were mere conduits, where board had duty to supervise administration of constitutional interpretation test applied to prospective voters, to prescribe rules and regulations, to fashion and administer new "citizenship" test, and power to remove registrars enforcing tests. 28 U.S.C.A. § 2281; 42 U.S.C.A. § 1971(a, c); U.S.C.A.Const. Amends. 14, 15; LSA-Const. art. 8, §§ 1(c, d), 18; LSA-R.S. 18:36, 18:191.

[4] States ⇐203
360k203 Most Cited Cases
Louisiana voting registrars bound to follow directions of state board of registration the members of which were made defendants in suit brought by United States challenging voter registration test procedures as racially discriminatory were not themselves indispensable parties. 28 U.S.C.A. § 2281; 42 U.S.C.A. § 1971(a, c); U.S.C.A.Const. Amends. 14, 15; LSA-R.S. 18:36, 18:191; LSA-Const. art. 8, §§ 1(c, d), 18.

[5] Elections ⇐19
144k19 Most Cited Cases
Cherished right of people to vote cannot be obliterated by use of laws which leave voting fate of citizen to passing whim or impulse of individual registrar. 28 U.S.C.A. § 2281; 42 U.S.C.A. § 1971(a, c); U.S.C.A.Const. Amends. 14, 15; LSA-Const. art. 8, § 1(c, d); LSA-R.S. 18:36.

[6] Elections ⇐12(5)
144k12(5) Most Cited Cases

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(Formerly 144k12)
Provisions of Louisiana Constitution and statutes which required voters to satisfy registrars of their ability to understand and give reasonable interpretation of any section of Federal or State Constitutions violated Constitution and specifically conflicted with prohibitions against discrimination in voting because of race found both in Fifteenth Amendment and in statute. 28 U.S.C.A. § 2281; 42 U.S.C.A. § 1971(a, c); U.S.C.A.Const. Amends. 14, 15; LSA-Const. art. 8, § 1(c, d); LSA-R.S. 18:36.

[7] Elections ⚿12(9.1)
144k12(9.1) Most Cited Cases
(Formerly 144k12(9), 144k12, 106k262.4(11))
Court has not merely power but duty to render, in suit brought by United States against state and its officials to protect voting rights of Negroes, decree which will so far as possible eliminate discriminatory effects of past as well as bar discrimination in future. 42 U.S.C.A. § 1971(a).

[8] Elections ⚿12(5)
144k12(5) Most Cited Cases
(Formerly 144k12, 106k262.4(11))
In suit brought by United States Attorney General against state and officials to protect voting rights of Negroes, court properly enjoined further use of unconstitutional test whereunder prospective applicants were required to satisfy registrars of their ability to understand and interpret any section of State or Federal Constitution, as test stood at time action was begun. 28 U.S.C.A. § 2281; 42 U.S.C.A. § 1971(a, c); U.S.C.A.Const. Amends. 14 , 15; LSA-Const. art. 8, § 1(c, d); LSA-R.S. 18:36.

[9] Elections ⚿12(5)
144k12(5) Most Cited Cases
(Formerly 144k12, 106k262.4(11))
Though validity of new Louisiana "citizenship" test for voting was not in issue in suit by United States against state and officials to protect voting rights of Negroes, it was proper to decree that as to persons who attained age and residence requirements during years in which invalid constitutional interpretation test was used, use of new citizenship test should be postponed in parishes involved until they had ordered complete re-registration so that new test would apply alike to all or none. 28 U.S.C.A. § 2281; 42 U.S.C.A. § 1971(a, c); U.S.C.A.Const. Amends. 14, 15; LSA-Const. art. 8, § 1(c, d); LSA-R.S. 18:36.

[10] Elections ⚿12(9.1)
144k12(9.1) Most Cited Cases
(Formerly 144k12(9), 106k262.4(11), 144k12)
It was appropriate exercise of discretion, in suit brought by United States against state and its officials to protect voting rights of Negroes, to order reports to be made every month concerning registration of voters in parishes where registrars had used invalid test so that court might be informed as to whether all discriminatory practices had been abandoned in good faith. 42 U.S.C.A. § 1971(a, c).

****818 *146** Harry J. Kron, Jr., Baton Rouge La., for appellants.

****819** Louis F. Claiborne, Washington, D.C., for appellee.

***147** Mr. Justice BLACK delivered the opinion of the Court.

Pursuant to authority granted in 42 U.S.C. s 1971(c) (1958 ed., Supp. V), the Attorney General brought this action on behalf of the United States in the United States District Court for the Eastern District of Louisiana against the State of Louisiana, the three members of the State Board of Registration, and the Director-Secretary of the Board. The complaint charged that the defendants by following and enforcing unconstitutional state laws had been denying and unless restrained by the court would continue to deny Negro citizens of Louisiana the right to vote, in violation of 42 U.S.C. s 1971(a) (1958 ed.) [FN1] and the Fourteenth and Fifteenth Amendments to the United States Constitution. The case was tried and after submission of evidence, [FN2] the three-judge District Court, convened pursuant to 28 U.S.C. s 2281 (1958 ed.), gave judgment for the United States. 225 F.Supp. 353. The State and the other defendants appealed, and we noted probable jurisdiction. 377 U.S. 987, 84 S.Ct. 1916, 12 L.Ed.2d 1042.

> FN1. 'All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race,

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color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.' 16 Stat. 140, 42 U.S.C. s 1971(a) (1958 ed.).

FN2. The appellants did not present any evidence. By stipulation all the Government's evidence was presented in written form.

The complaint alleged, and the District Court found, that beginning with the adoption of the Louisiana Constitution of 1898, when approximately 44% of all the registered voters in the State were Negroes, the State had put into effect a successful policy of denying Negro citizens the right to vote because of their race. The 1898 ***148** constitution adopted what was known as a 'grandfather clause,' which imposed burdensome requirements for registration thereafter but exempted from these future requirements any person who had been entitled to vote before January 1, 1867, or who was the son or grandson of such a person. [FN3] Such a transparent expedient for disfranchising Negroes, whose ancestors had been slaves until 1863 and not entitled to vote in Louisiana before 1867, [FN4] was held unconstitutional in 1915 as a violation of the Fifteenth Amendment, in a case involving a similar Oklahoma constitutional provision. Guinn v. United States, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340. Soon after that decision Louisiana, in 1921, adopted a new constitution replacing the repudiated 'grandfather clause' with what the complaint calls an 'interpretation test,' which required that an applicant for registration be able to 'give a reasonable interpretation' of any clause in the Louisiana Constitution or the Constitution of the United States. [FN5] From the adoption of the 1921 interpretation test until 1944, the District Court's opinion stated, the percentage of registered voters in Louisiana who were Negroes never exceeded one percent. Prior to 1944 Negro interest in voting in Louisiana had been slight, largely because the State's white primary law kept Negroes from voting in the Democratic Party primary election, the only election that mattered in the political climate of that State. In ****820** 1944, however, this Court invalidated the substantially identical white primary law of Texas, [FN6] and with the explicit statutory bar to their voting in the primary removed and because of a generally heightened political interest, Negroes in increasing ***149** numbers began to register in Louisiana. The white primary system had been so effective in barring Negroes from voting that the 'interpretation test' as a disfranching devise had been ignored over the years. Many registrars continued to ignore it after 1944, and in the next dozen years the proportion of registered votes who were Negroes rose from two-tenths of one percent to approximately 15% by March 1956. This fact, coupled with this Court's 1954 invalidation of laws requiring school segregation, [FN7] prompted the State to try new devices to keep the white citizens in control. The Louisiana Legislature created a committee which became known as the 'Segregation Committee' to seek means of accomplishing this goal. The chairman of this committee also helped to organize a semiprivate group called the Association of Citizens Councils, which thereafter acted in close cooperation with the legislative committee to preserve white supremacy. The legislative committee and the Citizens Councils set up programs, which parish voting registrars were required to attend, to instruct the registrars on how to promote white political control. The committee and the Citizens Councils also began a wholesale challenging of Negro names already on the voting rolls, with the result that thousands of Negroes, but virtually no whites, were purged from the rolls of voters. Beginning in the middle 1950's registrars of at least 21 parishes began to apply the interpretation test. In 1960 the State Constitution was amended to require every applicant thereafter to 'be able to understand' as well as 'give a reasonable interpretation' of any section of the State or Federal Constitution 'when read to him by the registrar.' [FN8] The State Board ***150** of Registration in cooperation with the Segregation Committee issued orders that all parish registrars must strictly comply with the new provisions.

FN3. La.Const.1898, Art. 197, s 5. See generally Eaton, The Suffrage Clause in the New Constitution of Louisiana, 13 Harv.L.Rev. 279.

FN4. The Louisiana Constitution of 1868 for the first time permitted Negroes to

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vote. La.Const.1868, Art. 98.

FN5. La.Const.1921, Art. VIII, ss 1(c), 1(d), LSA.

FN6. Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987.

FN7. Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873.

FN8. La.Acts 1960, No. 613, amending La.Const. Art. VIII, s 1(d), previously implemented in LSA--Rev.Stat. s 18:36. Under the 1921 constitution the requirement that an applicant be able 'to understand' a section 'read to him by the registrar' applied only to illiterates. La.Const.1921, Art. VIII, s 1(d); compare id., s 1(c).

[1] The interpretation test, the court found, vested in the voting registrars a virtually uncontrolled discretion as to who should vote and who should not. Under the State's statutes and constitutional provisions the registrars, without any objective standard to guide them, determine the manner in which the interpretation test is to be given, whether it is to be oral or written, the length and complexity of the sections of the State or Federal Constitution to be understood and interpreted, and what interpretation is to be considered correct. There was ample evidence to support the District Court's finding that registrars in the 21 parishes where the test was found to have been used had exercised their broad powers to deprive otherwise qualified Negro citizens of their right to vote; and that the existence of the test as a hurdle to voter qualification has in itself deterred and will continue to deter Negroes from attempting to register in Louisiana.

Because of the virtually unlimited discretion vested by the Louisiana laws in the registrars of voters, and because in the 21 parishes where the interpretation test was applied that discretion had been exercised to keep Negroes from voting because of their race, the District Court held the interpretation test invalid on its face and as applied, as a violation of ****821** the Fourteenth and Fifteenth Amendments to the United States Constitution and of 42 U.S.C. s 1971(a). [FN9] The District Court enjoined future use of the test in the State, and with respect to the 21 parishes where the invalid interpretation test was found to have ***151** been applied, the District Court also enjoined use of a newly enacted 'citizenship' test, which did not repeal the interpretation test and the validity of which was not challenged in this suit, unless a reregistration of all voters in those parishes is ordered, so that there would be no voters in those parishes who had not passed the same test.

FN9. 'Although the vote-abridging purpose and effect of the (interpretation) test render it per se invalid under the Fifteenth Amendment, it is also per se invalid under the Fourteenth Amendment. The vices cannot be cured by an injunction enjoining its unfair application.' 225 F.Supp., at 391--392.

I.

[2][3][4] We have held this day in United States v. Mississippi, 380 U.S. 128, 85 S.Ct. 808, that the Attorney General has power to bring suit against a State and its officials to protect the voting rights of Negroes guaranteed by 42 U.S.C. s 1971(a) and the Fourteenth and Fifteenth Amendments. [FN10] There can be no doubt from the evidence in this case that the District Court was amply justified in finding that Louisiana's interpretation test, as written and as applied, was part of a successful plan to deprive Louisiana Negroes of their right to vote. This device for accomplishing unconstitutional discrimination has been little if any less successful than was the 'grandfather clause' invalidated by this Court's decision in Guinn v. United States, supra, 50 ***152** years ago, which when that clause was adopted in 1898 had seemed to the leaders of Louisiana a much preferable way of assuring white political supremacy. The Governor of Louisiana stated in 1898 that he believed that the 'grandfather clause' solved the problem of keeping Negroes from voting 'in a much more upright and manly fashion' [FN11] than the method adopted previously by the States of Mississippi and South Carolina, which left the qualification of applicants to vote 'largely to the arbitrary discretion of the officers administering the law.' [FN12] A delegate to the 1898 Louisiana Constitutional Convention also criticized an interpretation test because the 'arbitrary power, lodged with the registration officer, practically

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places his decision beyond the pale of judicial review; and he can enfranchise or disfranchise voters at his own sweet will and pleasure without let or hindrance,' [FN13]

FN10. It is argued that the members of the State Board of Registration were not properly made defendants because they were 'mere conduits,' without authority to enforce state registration requirements. The Board has the power and duty to supervise administration of the interpretation test and prescribe rules and regulations for the registrars to follow in applying it. LSA--Rev.Stat. s 18:191, subd. A; La.Const. Art. VIII, s 18. The Board also is by statute directed to fashion and administer the new 'citizenship' test. LSA--Rev.Stat. s 18:191, subd. A; La.Const. Art. VIII, s 18. And the Board has power to remove any registrar from office 'at will.' La.Const. Art. VIII, s 18. In these circumstances the Board members were properly made defendants. Compare United States v. Mississippi, 380 U.S. at 141--142, 85 S.Ct. at 815.
There is also no merit in the argument that the registrars, who were not defendants in this suit, were indispensable parties. The registrars have no personal interest in the outcome of this case and are bound to follow the directions of the State Board of Registration.

FN11. Louisiana Senate Journal, 1898, p. 33.

FN12. Ibid.

FN13. Kernan, The Constitutional Convention of 1898 and its Work, Proceedings of the Louisiana Bar Association for 1898--1899, pp. 59--60.

[5][6] But Louisianans of a later generation did place just such arbitrary **822 power in the hands of election officers who have used it with phenomenal success to keep Negroes from voting in the State. The State admits that the statutes and provisions of the state constitution establishing the interpretation test 'vest discretion in the registrars of voters to determine the qualifications of applicants for registration' while imposing 'no definite and objective standards upon registrars of voters for the administration of the interpretation test.' And the District Court found that 'Louisiana * * * provides no effective method whereby arbitrary and capricious action by registrars of voters may be prevented or redressed.' [FN14] The applicant facing a *153 registrar in Louisiana thus has been compelled to leave his voting fate to that official's uncontrolled power to determine whether the applicant's understanding of the Federal or State Constitution is satisfactory. As the evidence showed, colored people, even some with the most advanced education and scholarship, were declared by voting registrars with less education to have an unsatisfactory understanding of the Constitution of Louisiana or of the United States. This is not a test but a trap, sufficient to stop even the most brilliant man on his way to the voting booth. The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws like this, which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar. Many of our cases have pointed out the invalidity of laws so completely devoid of standards and restraints. See, e.g., United States v. L. Cohen Grocery Co., 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516. Squarely in point is Schnell v. Davis, 336 U.S. 933, 69 S.Ct. 749, 93 L.Ed. 1093, affirming 81 F.Supp. 872 (D.C.S.D.Ala.), in which we affirmed a district court judgment striking down as a violation of the Fourteenth and Fifteenth Amendments an Alabama constitutional provision restricting the right to vote in that State to persons who could 'understand and explain any article of the Constitution of the United States' to the satisfaction of voting registrars. We likewise affirm here the District Court's holding that the provisions of the Louisiana Constitution and statutes which require voters to satisfy registrars of their ability to 'understand and give a reasonable interpretation of any section' of the Federal or Louisiana Constitution violate the Constitution. And we agree with the District Court that it specifically conflicts with the prohibitions against discrimination in voting because of race found both in the Fifteenth Amendment and 42 U.S.C. s 1971(a) to subject citizens to such an arbitrary power as Louisiana has given its registrars under these laws.

FN14. 225 F.Supp., at 384.

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***154** II.

[7][8] This leaves for consideration the District Court's decree. We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future. Little if any objection is raised to the propriety of the injunction against further use of the interpretation test as it stood at the time this action was begun, and without further discussion we affirm that part of the decree.

[9] Appellants' chief argument against the decree concerns the effect which should be given the new voter-qualification test adopted by the Board of Registration in August 1962, pursuant to statute [FN15] and subsequent constitutional amendment [FN16] after this suit had been filed. The new test, says the ****823** State, is a uniform, objective, standardized 'citizenship' test administered to all prospective voters alike. Under it, according to the State, an applicant is 'required to indiscriminately draw one of ten cards. Each card has six multiple choice questions, four of which the applicant must answer correctly.' Confining itself to the allegations of the complaint, the District Court did not pass upon the validity of the new test, but did take it into consideration in formulating the decree. [FN17] The court found that past discrimination against Negro ***155** applicants in the 21 parishes where the interpretation test had been applied had greatly reduced the proportion of potential Negro voters who were registered as compared with the proportion of whites. Most if not all of those white voters had been permitted to register on far less rigorous terms than colored applicants whose applications were rejected. Since the new 'citizenship' test does not provide for a reregistration of voters already accepted by the registrars, it would affect only applicants not already registered, and would not disturb the eligibility of the white voters who had been allowed to register while discriminatory practices kept Negroes from doing so. In these 21 parishes, while the registration of white persons was increasing, the number of Negroes registered decreased from 25,361 to 10,351. Under these circumstances we think that the court was quite right to decree that, as to persons who met age and residence requirements during the years in which the interpretation test was used, use of the new 'citizenship' test should be postponed in those 21 parishes where registrars used the old interpretation test until those parishes have ordered a complete reregistration of voters, so that the new test will apply alike to all or to none. Cf. United States v. Duke, 332 F.2d 759, 769--770 (C.A.5th Cir.).

FN15. La.Acts 1962, No. 62, amending LSA--Rev.Stat. 18:191, subd. A.

FN16. La.Acts 1962, No. 539, amending La.Const. Art. VIII, s 18.

FN17. Like the District Court, we express no opinion as to the constitutionality of the new 'citizenship' test. Any question as to that point is specifically reserved. That test was never challenged in the complaint or any other pleading. The District Court said 'we repeat that this decision does not touch upon the constitutionality of the citizenship test as a state qualification for voting.' 225 F.Supp., at 397. The Solicitor General did not challenge the validity of the new test in this Court either in briefs or in oral argument, but instead recognized specifically that that issue was not before us in this case. And at oral argument in this Court the attorney for the United States stated that the Government has pending in a lower court a new suit challenging registration procedures in Louisiana 'under the new regime,' i.e., employed subsequent to the invalidation of the interpretation test in this case. The new 'citizenship' test, he said, 'is simply not an issue in this proceeding and was not invalidated in the lower court and we are not here challenging it.'

[10] It also was certainly an appropriate exercise of the District Court's discretion to order reports to be made every month concerning the registration of voters in these 21 ***156** parishes, in order that the court might be informed as to whether the old discriminatory practices really had been abandoned in good faith. The need to eradicate past evil effects and to prevent the continuation or repetition in the future of the discriminatory practices shown to be so deeply engrained in the laws, policies, and

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traditions of the State of Louisiana, completely justified the District Court in entering the decree it did and in retaining jurisdiction of the entire case to hear any evidence of discrimination in other parishes and to enter such orders as justice from time to time might require.

Affirmed.

Mr. Justice HARLAN considers that the constitutional conclusions reached in this opinion can properly be based only on the provisions of the Fifteenth Amendment. In all other respects, he fully subscribes to this opinion.

380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709

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103 S.Ct. 2706
462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180
(Cite as: 462 U.S. 791, 103 S.Ct. 2706)

Supreme Court of the United States

MENNONITE BOARD OF MISSIONS, Appellant
v.
Richard C. ADAMS.

No. 82-11.

Argued March 30, 1983.
Decided June 22, 1983.

Purchaser of property at tax sale brought suit to quiet title. The Superior Court, Elkhart County, Indiana, quieted title to the purchaser. The mortgagee appealed and the Indiana Court of Appeals, Third District, affirmed, 427 N.E.2d 686. The Supreme Court noted probable jurisdiction. The Supreme Court, Justice Marshall, held that: (1) notice by mail or other means as certain to insure actual notice is minimum constitutional precondition to proceeding which will adversely affect liberty or property interests of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable; (2) mortgagee's knowledge of delinquency in payment of taxes is not equivalent to notice that tax sale is pending; and (3) notice as required under Indiana statute, by posting and publishing announcement of tax sale and mailing notice to mortgagor by certified mail, did not meet requirements of due process clause of the Fourteenth Amendment.

Reversed and remanded.

Justice O'Connor, dissented and filed opinion in which Justice Powell and Justice Rehnquist joined.

West Headnotes

[1] Constitutional Law ⇐277(1)
92k277(1) Most Cited Cases
(Formerly 92k277(2))
[1] Constitutional Law ⇐285
92k285 Most Cited Cases
Under Indiana law, mortgagee possesses substantial property interest that is significantly affected by tax sale, and since he has legally protected property interest, he is constitutionally entitled to notice reasonably calculated to apprise him of pending tax sale. IC 6-1.1-24-1 et seq., 6-1.1-24-3, 6-1.1-24-4, 6-1.1-24-4.2, 6-1.1-24-5, 6-1.1-24-9, 6-1.1-25-1 to 6-1.1-25-3, 6-1.1-25-6, 32-8-11-4, 32-8-11-7 (1982 Ed.); U.S.C.A. Const.Amend. 14.
[2] Taxation ⇐615
371k615 Most Cited Cases
[2] Taxation ⇐658(3)
371k658(3) Most Cited Cases
[2] Taxation ⇐660
371k660 Most Cited Cases
When mortgagee of property which is subject of pending tax sale is identified in mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to mortgagee's last known available address, or by personal service, and unless mortgagee is not reasonably identifiable, constructive notice alone does not satisfy constitutional requirements. IC 6-1.1-24-1 et seq., 6-1.1-24-3, 6-1.1-24-4, 6-1.1-25-4(d), 6-1.1- 25-14, 6-1.1-25-16, 32-8-11-4 , 32-8-11-7 (1982 Ed.); U.S.C.A. Const.Amend. 14.
[3] Taxation ⇐658(3)
371k658(3) Most Cited Cases
County's use of publication and posting, or mailed notice to property owner, is not reasonable means of notice, to mortgagee, of pending tax sale, and personal service or mailed notice is constitutionally required even though sophisticated creditors have means at their disposal to discover whether property taxes have not been paid and whether tax sale proceedings are therefore likely to be initiated. IC 6-1.1-24-4, 6-1.1-25-4(d), 6-1.1-25-14, 6-1.1-25- 16 , 32-8-11-4, 32-8-11-7 (1982 Ed.); U.S.C.A. Const.Amend. 14.
[4] Constitutional Law ⇐255(1)
92k255(1) Most Cited Cases
[4] Constitutional Law ⇐278(1.1)
92k278(1.1) Most Cited Cases
Although particularly extensive efforts to provide notice may often be required when state is aware of

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an interested party's inexperience or incompetence, party's ability to take steps to safeguard its interests does not relieve state of constitutional obligation to give notice of proceeding which will adversely affect liberty or property interests. IC 6-1.1-24-4, 6-1.1-25-4(d), 6-1.1-25-14, 6-1.1-25-16, 32-8-11-4, 32-8-11-7 (1982 Ed.); U.S.C.A. Const.Amend. 14.

[5] Constitutional Law ⇐255(1)
92k255(1) Most Cited Cases

[5] Constitutional Law ⇐278(1.1)
92k278(1.1) Most Cited Cases

Notice by mail or other means as certain to insure actual notice is minimum constitutional precondition to proceeding which will adversely affect liberty or property interests of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable. IC 6-1.1-24-4, 6-1.1-25-4(d), 6-1.1-25-14, 6-1.1-25-16, 32-8-11- 4, 32-8-11-7 (1982 Ed.); U.S.C.A. Const.Amend. 14.

[6] Taxation ⇐658(3)
371k658(3) Most Cited Cases
Validity

Mortgagee's knowledge of delinquency in payment of taxes is not equivalent to notice that tax sale is pending. IC 6-1.1-24-1 et seq. (1982 Ed.).

[7] Constitutional Law ⇐285
92k285 Most Cited Cases

[7] Taxation ⇐615
371k615 Most Cited Cases

Manner of notice of tax sale provided mortgagee under Indiana law by posting and publishing announcement of tax sale and by mailing notice to mortgagor by certified mail did not meet requirements of due process clause of Fourteenth Amendment. IC 6-1.1-24-1 et seq., 6-1.1-24-3, 6-1.1-24-4, 6-1.1- 25-4(d), 6-1.1-24-4.2, 6-1.1-24-5 , 6-1.1-24-9, 6-1.1-25-1 to 6- 1.1-25-3, 6-1.1-25-6, 6-1.1-25-14, 6-1.1-25-16, 32-8-11-4, 32-8- 11-7 (1982 Ed.); U.S.C.A. Const.Amend. 14.

**791 **2707 Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

An Indiana statute requires the county auditor to post notice in the county courthouse of the sale of real property for nonpayment of property taxes and to publish notice once each week for three consecutive weeks. Notice by certified mail must be given to the property owner, but at the time in question in this case there was no provision for notice by mail or personal service to mortgagees of the property. The purchaser at a tax sale acquires a certificate of sale that constitutes a lien against the property for the amount paid and is superior to all prior liens. The tax sale is followed by a 2-year period during which the owner or mortgagee may redeem the property. If no one redeems the property during this period, the tax sale purchaser may apply for a deed to the property, but before the deed is executed the county auditor must notify the former owner that he is entitled to redeem the property. If the property is not redeemed within 30 days, the county auditor may then execute a deed to the purchaser who then acquires an estate in fee simple, free and clear of all liens, and may bring an action to quiet title. Property on which appellant held a mortgage was sold to appellee for nonpayment of taxes. Appellant was not notified of the pending sale and did not learn of the sale until more than two years later, by which time the redemption period had run and the mortgagor still owed appellant money on the mortgage. Appellee then filed suit in state court seeking to quiet title to the property. The court upheld the tax sale statute against appellant's contention that it had not received constitutionally adequate notice of the pending tax sale and of its opportunity to redeem the property after the sale. The Indiana Court of Appeals affirmed.

Held: The manner of notice provided to appellant did not meet the requirements of the Due Process Clause of the Fourteenth Amendment. Pp. 2709 - 2712.

(a) Prior to an action that will affect an interest in life, liberty, or property protected by the Due Process Clause, a State must provide "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action ****2708** and afford them an opportunity to present their objections." Notice by publication is not reasonably calculated to inform interested parties who can be notified by more effective means such as personal service or mailed notice. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S.

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306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865. Pp. 2709 - 2710.

***792** (b) Since a mortgagee clearly has a legally protected property interest, he is entitled to notice reasonably calculated to apprise him of a pending tax sale. Constructive notice to a mortgagee who is identified in the public record does not satisfy the due process requirement of *Mullane.* Neither notice by publication and posting nor mailed notice to the property owner are means "such as one desirous of actually informing the [mortgagee] might reasonably adopt to accomplish it." *Mullane, supra,* at 315, 70 S.Ct., at 657. Personal service or notice by mail is required even though sophisticated creditors have means at their disposal to discover whether property taxes have not been paid and whether tax sale proceedings are therefore likely to be initiated. Pp. 2712 - 2710.

Ind.App., 427 N.E.2d 686, reversed and remanded.

William J. Cohen argued the cause for appellant. With him on the brief was *C. Whitney Slabaugh.*

Robert W. Miller argued the cause and filed a brief for appellee.

MARSHALL, Justice.

This appeal raises the question whether notice by publication and posting provides a mortgagee of real property with adequate notice of a proceeding to sell the mortgaged property for nonpayment of taxes.

I

To secure an obligation to pay $14,000, Alfred Jean Moore executed a mortgage in favor of appellant Mennonite Board of Missions (MBM) on property in Elkhart, Indiana, that Moore had purchased from MBM. The mortgage was recorded in the Elkhart County Recorder's Office on March 1, 1973. Under the terms of the agreement, Moore was responsible for paying all of the property taxes. Without MBM's knowledge, however, she failed to pay taxes on the property.

Indiana law provides for the annual sale of real property on which payments of property taxes have been delinquent for ***793** fifteen months or longer. Ind.Code § 6-1.1-24-1 *et seq.* Prior to the sale, the county auditor must post notice in the county courthouse and publish notice once each week for three consecutive weeks. § 6-1.1-24-3. The owner of the property is entitled to notice by certified mail to his last known address. § 6-1.1-24- 4. [FN1] Until 1980, however, Indiana law did not provide for notice by mail or personal service to mortgagees of property that was to be sold for nonpayment of taxes. [FN2]

> FN1. Because a mortgagee has no title to the mortgaged property under Indiana law, the mortgagee is not considered an "owner" for purposes of § 6-1.1-24-4. *First Savings & Loan Assn. of Central Indiana v. Furnish,* 174 Ind.App. 265, 367 N.E.2d 596, 600, n. 14 (Ind.App.1977).

> FN2. Ind.Code § 6-1.1-24-4.2, added in 1980, provides for notice by certified mail to any mortgagee of real property which is subject to tax sale proceedings, if the mortgagee has annually requested such notice and has agreed to pay a fee, not to exceed $10, to cover the cost of sending notice. Because the events in question in this case occurred before the 1980 amendment, the constitutionality of the amendment is not before us.

After the required notice is provided, the county treasurer holds a public auction at which the real property is sold to the highest bidder. § 6-1.1- 24-5 . The purchaser acquires a certificate of sale which constitutes a lien against the real property for the entire amount paid. § 6-1.1-24-9. This lien is superior to all other liens against the property which existed at the time the certificate was issued. *Ibid.*

The tax sale is followed by a two-year redemption period during which the "owner, ****2709** occupant, lienholder, or other person who has an interest in" the property may redeem the property. § 6-1.1-25-1 . To redeem the property an individual must pay the county treasurer a sum sufficient to cover the purchase price of the property at the tax sale, the amount of taxes and special assessments paid by the purchaser following the sale, plus an additional percentage specified in the statute. §§ 6-1.1-25-2,

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6-1.1-25- 3. the county in turn remits the payment to the purchaser of the property at the tax sale.

***794** If no one redeems the property during the statutory redemption period, the purchaser may apply to the county auditor for a deed to the property. Before executing and delivering the deed, the county auditor must notify the former owner that he is still entitled to redeem the property. § 6-1.1-25- 6. No notice to the mortgagee is required. If the property is not redeemed within thirty days, the county auditor may then execute and deliver a deed for the property to the purchaser, § 6-1.1-25-4, who thereby acquires "an estate in fee simple absolute, free and clear of all liens and encumbrances." § 6- 1.1-25-4(d).

After obtaining a deed, the purchaser may initiate an action to quiet his title to the property. § 6-1.1-25-14. The previous owner, lienholders, and others who claim to have an interest in the property may no longer redeem the property. They may defeat the title conveyed by the tax deed only by proving, *inter alia,* that the property had not been subject to, or assessed for, the taxes for which it was sold, that the taxes had been paid before the sale, or that the property was properly redeemed before the deed was executed. § 6-1.1-25-16.

In 1977 Elkhart County initiated proceedings to sell Moore's property for nonpayment of taxes. The County provided notice as required under the statute: it posted and published an announcement of the tax sale and mailed notice to Moore by certified mail. MBM was not informed of the pending tax sale either by the county auditor or by Moore. The property was sold for $1,167.75 to appellee Richard Adams on August 8, 1977. Neither Moore nor MBM appeared at the sale or took steps thereafter to redeem the property. Following the sale of her property, Moore continued to make payments each month to MBM, and as a result MBM did not realize that the property had been sold. On August 16, 1979, MBM first learned of the tax sale. By then the redemption period had run and Moore still owed appellant $8,237.19.

***795** In November 1979, Adams filed a suit in state court seeking to quiet title to the property. In opposition to Adams' motion for summary judgment, MBM contended that it had not received constitutionally adequate notice of the pending tax sale and of the opportunity to redeem the property following the tax sale. The trial court upheld the Indiana tax sale statute against this constitutional challenge. The Indiana Court of Appeals affirmed. 427 N.E.2d 686 (1981). We noted probable jurisdiction, 459 U.S. 903, 103 S.Ct. 204, 74 L.Ed.2d 164 (1982), and we now reverse.

II

In *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950), this Court recognized that prior to an action which will affect an interest in life, liberty, or property protected by the Due Process Clause of the Fourteenth Amendment, a State must provide "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Invoking this "elementary and fundamental requirement of due process," *ibid,* the Court held that published notice of an action to settle the accounts of a common trust fund was not sufficient to inform beneficiaries of the trust whose names and addresses were known. The Court explained that notice by publication was not reasonably calculated to provide actual notice of the pending proceeding and was therefore inadequate to inform those ****2710** who could be notified by more effective means such as personal service or mailed notice:

> "Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed.
>
> The chance of actual notice is further reduced when as here the notice required does not even name ***796** those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice we are unable to regard this as more than a feint." *Id.,* at 315, 70 S.Ct., at 658. [FN3]

FN3. The decision in *Mullane* rejected one of the premises underlying this Court's previous decisions concerning the

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requirements of notice in judicial proceedings: that due process rights may vary depending on whether actions are *in rem* or *in personam.* 339 U.S., at 312, 70 S.Ct., at 656. See *Shaffer v. Heitner,* 433 U.S. 186, 206, 97 S.Ct. 2569, 2580, 53 L.Ed.2d 683 (1977). Traditionally, when a state court based its jurisdiction upon its authority over the defendant's person, personal service was considered essential for the court to bind individuals who did not submit to its jurisdiction. See, *e.g., Hamilton v. Brown,* 161 U.S. 256, 275, 16 S.Ct. 585, 592, 40 L.Ed. 691 (1896); *Arndt v. Griggs,* 134 U.S. 316, 320, 10 S.Ct. 557, 558, 33 L.Ed. 918 (1890); *Pennoyer v. Neff,* 95 U.S. 714, 726, 733-734, 24 L.Ed. 565 (1878) ("Due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered."). In *Hess v. Pawloski,* 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091 (1927), the Court recognized for the first time that service by registered mail, in place of personal service, may satisfy the requirements of due process. Constructive notice was never deemed sufficient to bind an individual in an action *in personam.*

In contrast, in *in rem* or *quasi in rem* proceedings in which jurisdiction was based on the court's power over property within its territory, see generally *Shaffer v. Heitner, supra,* 433 U.S., at 196-205, 97 S.Ct., at 2575-2580, constructive notice to nonresidents was traditionally understood to satisfy the requirements of due process.

In order to settle questions of title to property within its territory, a state court was generally required to proceed by an *in rem* action since the court could not otherwise bind nonresidents. At one time constructive service was considered the only means of notifying nonresidents since it was believed that "[p]rocess from the tribunals of one State cannot run into another State." *Pennoyer v. Neff, supra,* at 727. See *Ballard v. Hunter,* 204 U.S. 241, 255, 27 S.Ct. 261, 266, 51 L.Ed. 461 (1907). As a result, the nonresident acquired the duty "to take measures that in some way he shall be represented when his property is called into requisition." *Id.,* at 262, 27 S.Ct., at 269. If he "fail[ed] to get notice by the ordinary publications which have been usually required in such cases, it [was] his misfortune." *Ibid.*

Rarely was a corresponding duty imposed on interested parties who resided within the State and whose identities were reasonably ascertainable. Even in actions *in rem,* such individuals were generally provided personal service. See, *e.g., Arndt v. Griggs, supra,* 134 U.S., at 326-327, 10 S.Ct., at 560-561. Where the identity of interested residents could not be ascertained after a reasonably diligent inquiry, however, their interests in property could be affected by a proceeding *in rem* as long as constructive notice was provided. See *Hamilton v. Brown, supra,* 161 U.S., at 275, 16 S.Ct., at 592; *American Land Co. v. Zeiss,* 219 U.S. 47, 61-62, 65-66, 31 S.Ct. 200, 206-207, 55 L.Ed. 82 (1911).

Beginning with *Mullane,* this Court has recognized, contrary to the earlier line of cases, "that an adverse judgment *in rem* directly affects the property owner by divesting him of his rights in the property before the court." *Shaffer v. Heitner, supra,* 433 U.S., at 206, 97 S.Ct., at 2580.

In rejecting the traditional justification for distinguishing between residents and nonresidents and between *in rem* and *in personam* actions, the Court has not left all interested claimants to the vagaries of indirect notice. Our cases have required the State to make efforts to provide actual notice to all interested parties comparable to the efforts that were previously required only in *in personam* actions. See *infra,* at 2714 - 2715.

***797** In subsequent cases, this Court has adhered unwaiveringly to the principle announced in *Mullane.* In *Walker v. City of Hutchinson,* 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed.2d 178 (1956), for example, the Court held that notice of condemnation proceedings published in a local newspaper was an inadequate means of informing a

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landowner whose name was known to the city and was on the official records. Similarly, in *Schroeder v. City of New York,* 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed.2d 255 (1962), the Court concluded that publication in a newspaper and posted notices were inadequate ****2711** to apprise a property owner of condemnation proceedings when his name and address were readily ascertainable from both deed records and tax rolls. Most recently, in *Greene v. Lindsey,* 456 U.S. 444, 102 S.Ct. 1874, 72 L.Ed.2d 249 (1982), we held that posting a summons on the door of a tenant's apartment was an inadequate means of providing notice of forcible entry and detainer actions. See also *Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1, 13-15, 98 S.Ct. 1554, 1562-1563, 56 L.Ed.2d 30 (1978); *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 174-175, 94 S.Ct. 2140, 2150-2151, 40 L.Ed.2d 732 (1974); *Bank of Marin v. England,* 385 U.S. 99, 102, 87 S.Ct. 274, 276, 17 L.Ed.2d 197 (1966); *Covey v. Somers,* 351 U.S. 141, 146-147, 76 S.Ct. 724, 727, 100 L.Ed. 1021 (1956); *City of New York v. New York, N.H. & H.R. Co.,* 344 U.S. 293, 296-297, 73 S.Ct. 299, 301, 97 L.Ed. 333 (1953).

[1][2] ***798** This case is controlled by the analysis in *Mullane.* To begin with, a mortgagee possesses a substantial property interest that is significantly affected by a tax sale. Under Indiana law, a mortgagee acquires a lien on the owner's property which may be conveyed together with the mortgagor's personal obligation to repay the debt secured by the mortgage. Ind.Code § 32-8-11-7. A mortgagee's security interest generally has priority over subsequent claims or liens attaching to the property, and a purchase money mortgage takes precedence over virtually all other claims or liens including those which antedate the execution of the mortgage. Ind.Code § 32-8-11-4. The tax sale immediately and drastically diminishes the value of this security interest by granting the tax-sale purchaser a lien with priority over that of all other creditors. Ultimately, the tax sale may result in the complete nullification of the mortgagee's interest, since the purchaser acquires title free of all liens and other encumbrances at the conclusion of the redemption period.

Since a mortgagee clearly has a legally protected property interest, he is entitled to notice reasonably calculated to apprise him of a pending tax sale. Cf. *Wiswall v. Sampson,* 55 U.S. 52, 67, 14 L.Ed. 322 (1852). When the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service. But unless the mortgagee is not reasonably identifiable, constructive notice alone does not satisfy the mandate of *Mullane.* [FN4]

> FN4. In this case, the mortgage on file with the county recorder identified the mortgagee only as "MENNONITE BOARD OF MISSIONS a corporation, of Wayne County, in the State of Ohio." We assume that the mortgagee's address could have been ascertained by reasonably diligent efforts. See *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 317, 70 S.Ct. 652, 658-659, 94 L.Ed. 865 (1950). Simply mailing a letter to "Mennonite Board of Missions, Wayne County, Ohio," quite likely would have provided actual notice, given "the well-known skill of postal officials and employees in making proper delivery of letters defectively addressed." *Grannis v. Ordean,* 234 U.S. 385, 397-398, 34 S.Ct. 779, 784, 58 L.Ed. 1363 (1914). We do not suggest, however, that a governmental body is required to undertake extraordinary efforts to discover the identity and whereabouts of a mortgagee whose identity is not in the public record.

[3][4][5][6] ***799** Neither notice by publication and posting, nor mailed notice to the property owner, are means "such as one desirous of actually informing the [mortgagee] might reasonably adopt to accomplish it." *Mullane, supra,* 339 U.S., at 315, 70 S.Ct., at 657. Because they are designed primarily to attract prospective purchasers to the tax sale, publication and posting are unlikely to reach those who, although they have an interest in the property, do not make special efforts to keep abreast of such notices. *Walker v. City of Hutchinson, supra,* 352 U.S., at 116, 77 S.Ct., at 202; *New York v. New York, N.H. & H.R. Co., supra,* 344 U.S., at 296, 73 S.Ct., at 301; *Mullane, supra,* 339 U.S., at 315, 70 S.Ct., at 657. Notice to the property owner, who is not in privity with his

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creditor and who has failed to take steps necessary to preserve his own property interest, also cannot be expected to lead to actual notice to the mortgagee. ****2712** Cf. *Nelson v. New York City,* 352 U.S. 103, 107-109, 77 S.Ct. 195, 197-199, 1 L.Ed.2d 171 (1956). The County's use of these less reliable forms of notice is not reasonable where, as here, "an inexpensive and efficient mechanism such as mail service is available." *Greene v. Lindsey, supra,* 456 U.S., at 455, 102 S.Ct., at 1881.

Personal service or mailed notice is required even though sophisticated creditors have means at their disposal to discover whether property taxes have not been paid and whether tax sale proceedings are therefore likely to be initiated. In the first place, a mortgage need not involve a complex commercial transaction among knowledgeable parties, and it may well be the least sophisticated creditor whose security interest is threatened by a tax sale. More importantly, a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation. It is true that particularly extensive efforts to provide notice may often be required when the State is aware of a party's inexperience or incompetence. See, *e.g., Memphis Light, Gas & Water Div. v. Craft, supra,* 436 U.S., at 13- 15, 98 S.Ct., at 1562-1564; *Covey v. Somers, supra.* But it does not follow that the State may ***800** forego even the relatively modest administrative burden of providing notice by mail to parties who are particularly resourceful. [FN5] Cf. *New York v. New York, N.H. & H.R. Co., supra,* 344 U.S., at 297, 73 S.Ct., at 301. Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable. Furthermore, a mortgagee's knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending. The latter "was the information which the [County] was constitutionally obliged to give personally to the appellant--an obligation which the mailing of a single letter would have discharged." *Schroeder v. City of New York, supra,* 371 U.S., at 214, 83 S.Ct., at 283.

> FN5. Indeed, notice by mail to the mortgagee may ultimately relieve the county of a more substantial administrative burden if the mortgagee arranges for payment of the delinquent taxes prior to the tax sale.

[7] We therefore conclude that the manner of notice provided to appellant did not meet the requirements of the Due Process Clause of the Fourteenth Amendment. [FN6] Accordingly, the judgment of the Indiana Court of Appeals is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

> FN6. This appeal also presents the question whether, before the county auditor executes and delivers a deed to the tax-sale purchaser, the mortgagee is constitutionally entitled to notice of its right to redeem the property. Cf. *Griffin v. Griffin,* 327 U.S. 220, 229, 66 S.Ct. 556, 560-561, 90 L.Ed. 635 (1946). Because we conclude that the failure to give adequate notice of the tax sale proceeding deprived appellant of due process of law, we need not reach this question.

It is so ordered.

Justice O'CONNOR, with whom Justice POWELL and Justice REHNQUIST join, dissenting.

Today, the Court departs significantly from its prior decisions and holds that before the State conducts *any* proceeding that will affect the legally protected property interests of ****801** any* party, the State must provide notice to that party by means certain to ensure actual notice as long as the party's identity and location are "reasonably ascertainable." *Ante,* at 2712. Applying this novel and unjustified principle to the present case, the Court decides that the mortgagee involved deserved more than the notice by publication and posting that were provided. I dissent because the Court's approach is unwarranted both as a general rule and as the rule of this case.

I

In *Mullane v. Central Hanover Trust Co.,* 339 U.S.

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306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950), the Court established ****2713** that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." We emphasized that notice is constitutionally adequate when "the practicalities and peculiarities of the case ... are reasonably met," *id.*, at 314-315, 70 S.Ct., at 657. See also *Walker v. City of Hutchinson,* 352 U.S. 112, 115, 77 S.Ct. 200, 202, 1 L.Ed.2d 178 (1956); *Schroeder v. City of New York,* 371 U.S. 208, 211-212, 83 S.Ct. 279, 281-282, 9 L.Ed.2d 255 (1962); *Greene v. Lindsey,* 456 U.S. 444, 449-450, 102 S.Ct. 1874, 1877-1878, 72 L.Ed.2d 249 (1982). The key focus is the "reasonableness" of the means chosen by the State. *Mullane, supra,* 339 U.S., at 315, 70 S.Ct., at 657. Whether a particular method of notice is reasonable depends on the outcome of the balance between the "interest of the State" and "the individual interest sought to be protected by the Fourteenth Amendment." *Id.,* at 314, 70 S.Ct., at 657. Of course, "[i]t is not our responsibility to prescribe the form of service that the [State] ... should adopt." *Greene, supra,* 456 U.S., at 455, n. 9, 102 S.Ct., at 1880, n. 9. It is the primary responsibility of the State to strike this balance, and we will upset this process only when the State strikes the balance in an irrational manner.

From *Mullane* on, the Court has adamantly refused to commit "itself to any formula achieving a balance between these interests in a particular proceeding or determining ***802** when constructive notice may be utilized or what test it must meet." 339 U.S. at 314, 70 S.Ct., at 657. Indeed, we have recognized "the impossibility of setting up a rigid formula as to the kind of notice that must be given; notice will *vary* with the circumstances and conditions." *Walker, supra,* 352 U.S., at 115, 77 S.Ct., at 202 (emphasis added). Our approach in these cases has always reflected the general principle that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy,* 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). See also *Mathews v. Eldridge,* 424 U.S. 319, 334-335, 96 S.Ct. 893, 902-903, 47 L.Ed.2d 18 (1976).

A

Although the Court purports to apply these settled principles in this case, its decision today is squarely at odds with the balancing approach that we have developed. The Court now holds that *whenever* a party has a legally protected property interest, "[n]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests ... if [the party's] name and address are reasonably ascertainable." *Ante,* at 2712. Without knowing what state and individual interests will be at stake in future cases, the Court espouses a general principle ostensibly applicable whenever *any* legally protected property interest may be adversely affected. This is a flat rejection of the view that no "formula" can be devised that adequately evaluates the constitutionality of a procedure created by a State to provide notice in a certain class of cases. Despite the fact that *Mullane* itself accepted that constructive notice satisfied the dictates of due process in certain circumstances, [FN1] the ***803** Court, citing *Mullane,* now holds that constructive notice can *never* suffice whenever there is a legally protected property interest at stake.

> FN1. In *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950), we held that "[p]ersonal service has not in all circumstances been regarded as indispensable to the process due to residents, and it has more often been held unnecessary as to nonresidents."

In seeking to justify this broad rule, the Court holds that although a party's inability to safeguard its interests may result in imposing greater notice burdens on the State, the fact that a party may be more ****2714** able "to safeguard its interests does not relieve the State of its constitutional obligation." *Ante,* at 2712. Apart from ignoring the fact that it is the totality of circumstances that determines the sufficiency of notice, the Court also neglects to consider that the constitutional obligation imposed upon the State may itself be defined by the party's ability to protect its interest. As recently as last

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Term, the Court held that the focus of the due process inquiry has always been the effect of a notice procedure on "a particular *class* of cases." *Greene, supra,* 456 U.S., at 451, 102 S.Ct., at 1878 (emphasis added). In fashioning a broad rule for "the least sophisticated creditor," *ante,* at 2712, the Court ignores the well-settled principle that "procedural due process rules are shaped by the risk of error inherent in the truth finding process as applied to the generality of cases, not the rare exceptions." *Mathews v. Eldridge, supra,* 424 U.S., at 344, 96 S.Ct., at 907; see also *Califano v. Yamasaki,* 442 U.S. 682, 696, 99 S.Ct. 2545, 2555, 61 L.Ed.2d 176 (1979). If the members of a particular class generally possess the ability to safeguard their interests, then this fact must be taken into account when we consider the "totality of circumstances," as required by *Mullane.* Indeed, the criterion established by *Mullane* " 'is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.' " 339 U.S., at 315, 70 S.Ct., at 657 (quoting *American Land Co. v. Zeiss,* 219 U.S. 47, 67, 31 S.Ct. 200, 207, 55 L.Ed. 82 (1911)).

The Court also suggests that its broad rule has really been the law ever since *Mullane.* See *ante,* at 2710, n. 3. The Court reasons that before *Mullane,* the characterization of proceedings as *in personam* or *in rem* was relevant to ***804** determining whether the notice given was constitutionally sufficient, [FN2] and that once *Mullane* held that the "power of the State to resort to 'constructive service" no longer depended upon the "historic antithesis" of *in rem* and *in personam* proceedings, 339 U.S., at 312-313, 70 S.Ct., at 656, constructive notice became insufficient as to *all* proceedings.

> FN2. The Court is simply incorrect in asserting that before *Mullane,* constructive notice was rarely deemed sufficient even as to *in rem* proceedings when residents of the State were involved, *ante,* at 2710, n. 3. See, *e.g., Longyear v. Toolan,* 209 U.S. 414, 417-418, 28 S.Ct. 506, 507-508, 52 L.Ed. 859 (1908). See also Note, The Constitutionality of Notice by Publication in Tax Sale Proceedings, 84 Yale L.J. 1505, 1507 (1975) ("This rule [permitting constructive notice] was ... extended to all in rem proceedings, whether involving property owned by nonresidents or residents.").

The plain language of *Mullane* is clear that the Court expressly refused to reject constructive notice as *per se* insufficient. See 339 U.S., at 312- 314, 70 S.Ct., at 656-657. Moreover, the Court errs in thinking that the only justification for constructive notice is the distinction between types of proceedings. See *ante,* at 2710, n. 3. The historical justification for constructive notice was that those with an interest in property were under an obligation to act reasonably in keeping themselves informed of proceedings that affected that property. See *e.g., North Laramie Land Co. v. Hoffman,* 268 U.S. 276, 283, 45 S.Ct. 491, 494, 69 L.Ed. 953 (1925); *Ballard v. Hunter,* 204 U.S. 241, 262, 27 S.Ct. 261, 269, 51 L.Ed. 461 (1907). As discussed in Part II of this dissent, *infra, Mullane* expressly acknowledged, and did not reject, the continued vitality of the notion that property owners had some burden to protect their property. See 339 U.S., at 316, 70 S.Ct., at 658.

B

The Court also holds that the condition for receiving notice under its new approach is that the name and address of the party must be "reasonably ascertainable." In applying this requirement to the mortgagee in this case, the Court holds that the State must exercise "reasonably diligent efforts" in determining the address of the mortgagee, *id.,* at 2711, n. 4, ***805** and suggests that the State is required to make ****2715** some effort "to discover the identity and the whereabouts of a mortgagee whose identity is not in the public record." *Ibid.* Again, the Court departs from our prior cases. In *all* of the cases relied on by the Court in its analysis, the State either actually knew the identity or incapacity of the party seeking notice, or that identity was "very easily ascertainable." *Schroeder, supra,* 371 U.S., at 212-213, 83 S.Ct., at 282. See also *Mullane, supra,* 339 U.S., at 318, 70 S.Ct., at 659; *Covey v. Town of Summers,* 351 U.S. 141, 146, 76 S.Ct., at 727 (1956); *Walker, supra,* 352 U.S., at 116, 77 S.Ct., at 202-203; *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 175, 94 S.Ct. 2140, 2151, 40 L.Ed.2d 732 (1974). [FN3] Under the

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Court's decision today, it is not clear how far the State must go in providing for reasonable efforts to ascertain the name and address of an affected party. Indeed, despite the fact that the recorded mortgage failed to include the appellant's address, *see ante,* at 2711, n. 4, the Court concludes that its whereabouts were "reasonably identifiable." *Id.,* at 2711. This uncertainty becomes particularly ominous in the light of the fact that the duty to ascertain identity and location, and to notify by mail or other similar means, exists whenever any legally protected interest is implicated.

> FN3. In *Mullane,* the Court contrasted those parties whose identity and whereabouts are known or "at hand" with those "whose interests or whereabouts could not with due diligence be ascertained." 339 U.S., at 318, 317, 70 S.Ct., at 658, 659. This language must be read in the light of the facts of *Mullane,* in which the identity and location of certain beneficiaries were actually known. In addition, the Court in *Mullane* expressly rejected the view that a search "under ordinary standards of diligence" was required in that case. *Id.,* 339 U.S., at 317, 70 S.Ct., at 659.

II

Once the Court effectively rejects *Mullane* and its progeny by accepting a *per se* rule against constructive notice, it applies its rule and holds that the mortgagee in this case must receive personal service or mailed notice because it has a legally protected interest at stake, and because the mortgage was publicly recorded. See *ante,* at 2711. If the Court had ***806** observed its prior decisions and engaged in the balancing required by *Mullane,* it would have reached the opposite result.

It cannot be doubted that the State has a vital interest in the collection of its tax revenues in whatever reasonable manner that it chooses: "In authorizing the proceedings to enforce the payment of the taxes upon lands sold to a purchaser at tax sale, the State is in exercise of its sovereign power to raise revenue essential to carry on the affairs of state and the due administration of the laws.... 'The process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain.' " *Leigh v. Green,* 193 U.S. 79, 89, 24 S.Ct. 390, 392, 48 L.Ed. 623 (1904) (quoting *Bell's Gap Railroad Company v. Pennsylvania,* 134 U.S. 232, 239, 10 S.Ct. 533, 535, 33 L.Ed. 892 (1890)). The State has decided to accommodate its vital interest in this respect through the sale of real property on which payments of property taxes have been delinquent for a certain period of time. [FN4]

> FN4. The Court suggests that the notice that it requires "may ultimately relieve the county of a more substantial administrative burden if the mortgagee arranges for payment of the delinquent taxes prior to the tax sale." *Ante,* at 2712, n. 5. The Court neglects the fact that the State is a better judge of how it wants to settle its tax debts than is this Court.

The State has an equally strong interest in avoiding the burden imposed by the requirement that it must exercise "reasonable" efforts to ascertain the identity and location of any party with a legally protected interest. In the instant case, that burden is not limited to mailing notice. Rather, the State must have someone check the records and ascertain with respect to each delinquent taxpayer whether there is a mortgagee, perhaps whether the mortgage has been paid off, and whether there is a dependable address.

Against these vital interests of the State, we must weigh the interest possessed by ****2716** the relevant class--in this case, ***807** mortgagees. [FN5] Contrary to the Court's approach today, this interest may not be evaluated simply by reference to the fact that we have frequently found constructive notice to be inadequate since *Mullane.% Rather, such interest "must be judged in the light of its practical application to the affairs of men as they are ordinarily conducted."* North Laramie Land Co., supra, *268 U.S., at 283, 45 S.Ct., at 494.*

> FN5. This is not to say that the rule espoused must cover all conceivable mortgagees in all conceivable circumstances. The flexibility of due process is sufficient to accommodate those

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atypical members of the class of mortgagees.

Chief Justice Marshall wrote long ago that "it is part of common prudence for all those who have any interest in [property], to guard that interest by persons who are in a situation to protect it." *The Mary,* 13 U.S. (9 Cranch) 126, 144, 3 L.Ed. 678 (1815). We have never rejected this principle, and, indeed, we held in *Mullane* that "[a] State may indulge" the assumption that a property owner "usually arranges means to learn of any direct attack upon his possessory or proprietary rights." 339 U.S., at 316, 70 S.Ct., at 658. When we have found constructive notice to be inadequate, it has always been where an owner of property is, for all purposes, *unable* to protect his interest because there is no practical way for him to learn of state action that threatens to affect his property interest. In each case, the adverse action was one that was completely unexpected by the owner, and the owner would become aware of the action only by the fortuitous occasion of reading "an advertisement in small type inserted in the back pages of a newspaper .... [that may] not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention." *Mullane, supra,* 339 U.S., at 315, 70 S.Ct., at 658. In each case, the individuals had no reason to expect that their property interests were being affected.

This is not the case as far as tax sales and mortgagees are concerned. Unlike condemnation or an unexpected accounting, ***808** the assessment of taxes occurs with regularity and predictability, and the state action in this case cannot reasonably be characterized as unexpected in any sense. Unlike the parties in our other cases, the Mennonite Board had a regular event, the assessment of taxes, upon which to focus, in its effort to protect its interest. Further, approximately 95% of the mortgage debt outstanding in the United States is held by private institutional lenders and federally-supported agencies. U.S. Dept. of Commerce, Statistical Abstract of the United States: 1982-83, 511 (103d ed.). [FN6] It is highly unlikely, if likely at all, that a significant number of mortgagees are unaware of the consequences that ensue when their mortgagors fail to pay taxes assessed on the mortgaged property. Indeed, in this case, the Board itself required that Moore pay all property taxes.

FN6. The Court holds that "a mortgage need not involve a complex commercial transaction among knowledgeable parties ...." *Ante,* at 2712. This is certainly true; however, that does not change the fact that even if the Board is not a professional money lender, it voluntarily entered into a fairly sophisticated transaction with Moore. As the court below observed: "The State cannot reasonably be expected to assume the risk of its citizens' business ventures." Pet. for Cert. 27, n. 9.

There is no doubt that the Board could have safeguarded its interest with a minimum amount of effort. The county auctions of property commence by statute on the second Monday of each year. Ind.Code § 6-1.1-24-2(5). The county auditor is required to post notice in the county courthouse at least three weeks before the date of sale. Ind.Code § 6-1.1-24-3(a). The auditor is also required to publish notice in two different newspapers once each week for three weeks before the sale. Ind.Code § 6-1.1-24-3(a); Ind.Code § 6-1.1-22-4(b). The Board could have supplemented the protection offered by the State with the additional measures suggested by the court below: The Board ****2717** could have required that Moore provide it with copies of paid tax assessments, or could have required ***809** that Moore deposit the tax monies in an escrow account, or could have itself checked the public records to determine whether the tax assessment had been paid. Pet. for Cert. 27.

When a party is unreasonable in failing to protect its interest despite its ability to do so, due process does not require that the State save the party from its own lack of care. The balance required by *Mullane* clearly weighs in favor of finding that the Indiana statutes satisfied the requirements of due process. Accordingly, I dissent.

462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180

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96 S.Ct. 893
424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18
(Cite as: 424 U.S. 319, 96 S.Ct. 893)

Briefs and Other Related Documents

Supreme Court of the United States

F. David MATHEWS, Secretary of Health, Education, and Welfare, Petitioner,
v.
George H. ELDRIDGE.

No. 74-204.

Argued Oct. 6, 1975.
Decided Feb. 24, 1976.

A person whose social security disability benefits had been terminated brought an action challenging the constitutional validity of the administrative procedures established by the Secretary of Health, Education and Welfare for assessing whether there exists a continuing disability. The United States District Court for the Western District of Virginia, 361 F.Supp. 520, determined that the administrative procedures in question were unconstitutional, and the Court of Appeals, 493 F.2d 1230, affirmed. On grant of certiorari, the Supreme Court, Mr. Justice Powell, held that an evidentiary hearing is not required prior to termination of disability benefits, and that the present administrative procedures for such termination fully comport with due process.

Reversed.

Mr. Justice Brennan dissented and filed opinion in which Mr. Justice Marshall concurred.

West Headnotes

[1] Social Security and Public Welfare 145.5
356Ak145.5 Most Cited Cases
(Formerly 356Ak145)
Despite disability benefit claimant's failure to exhaust administrative remedies under Social Security Act after termination of disability benefits, district court had jurisdiction to entertain his claim that evidentiary hearing was required prior to termination of such benefits where claimant's answers to questionnaire and letter to state agencies specifically presented claim that his benefits should not be terminated because he was still disabled and where claimant's interest in having particular issue promptly resolved was so great that deference to decision of Secretary of Health, Education and Welfare whether to waive exhaustion requirements was inappropriate. Social Security Act, § 205(a, g, h) as amended 42 U.S.C.A. § 405(a, g, h); Fed.Rules Civ.Proc. rules 8(c), 12(h)(1), 28 U.S.C.A .; Social Security Administration Regulations, §§ 404.910, 404.916, 404.940, 42 U.S.C.A. App.; 28 U.S.C.A. §§ 1257, 1291.

[2] Social Security and Public Welfare 145.5
356Ak145.5 Most Cited Cases
(Formerly 356Ak145)
Secretary of Health, Education and Welfare may waive requirement that administrative remedies be exhausted before court review of agency determination is sought if Secretary satisfies himself, at any stage of administrative process, that no further review is warranted either because internal needs of agency are fulfilled or because relief that is sought is beyond his power to confer. Social Security Act, § 205(g) as amended 42 U.S.C.A. § 405(g).

[3] Constitutional Law 277(1)
92k277(1) Most Cited Cases
Interest by individual in continued receipt of social security benefits is statutorily-created property interest protected by due process clause of Fifth Amendment. Social Security Act, § 201 et seq. as amended 42 U.S.C.A. § 401 et seq.; U.S.C.A.Const. Amend. 5.

[4] Constitutional Law 251.6
92k251.6 Most Cited Cases
(Formerly 92k305(2))
Fundamental requirement of due process is opportunity to be heard at meaningful time and in meaningful manner. U.S.C.A.Const. Amends. 5, 14.

[5] Constitutional Law 251.5
92k251.5 Most Cited Cases
(Formerly 92k251)
Due process is not technical conception with fixed

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content unrelated to time, place and circumstances; rather, it is flexible and calls for such procedural protections as particular situation demands. U.S.C.A.Const. Amends. 5, 14.

[6] Constitutional Law ⚖251.1
92k251.1 Most Cited Cases
(Formerly 92k251)
Identification of specific dictates of due process generally requires consideration of three distinct factors: private interest that will be affected by official action; risk of erroneous deprivation of such interest through procedures used, and probable value, if any, of additional or substitute procedural safeguards; and government's interest, including function involved and fiscal and administrative burdens that additional or substitute procedural requirements would entail. U.S.C.A.Const. Amends. 5, 14.

[7] Constitutional Law ⚖278.7(3)
92k278.7(3) Most Cited Cases
(Formerly 92k299)
Evidentiary hearing is not required prior to termination of social security disability benefits; present administrative procedures for such terminations fully comport with due process. U.S.C.A.Const. Amends. 5, 14; Social Security Act, §§ 201(b), 202(b-d), 204, 204(b), 205(a, g, h), 215, 216(i)(2)(D), 221, 221(b, c), 223, 223(a)(1, 2), (d)(1), (d)(1)(A), (d)(2)(A), (d)(3), 224, 1614(a)(3), 1631(c) as amended 42 U.S.C.A. §§ 401 et seq., 401(b), 402(b-d), 404, 404(b) 405(a, g, h), 415, 416(i)(2)(D), 421, 421(b, c), 423, 423(a)(1, 2), (d)(1), (d)(1)(A), (d)(2)(A), (d)(3), 424a, 1382c(a)(3), 1383(c); Social Security Administration Regulations, §§ 404.408, 404.501-404.515, 404.503, 404.504, 404.907, 404.909, 404.910, 404.916, 404.917, 404.927, 404.934, 404.940, 404.945, 404.951, 42 U.S.C.A. App.; 28 U.S.C.A. §§ 1257, 1291, 1361.

[8] Constitutional Law ⚖318(1)
92k318(1) Most Cited Cases
Degree of potential deprivation that may be created by particular decision is factor to be considered in assessing validity of administrative decision-making process from due process standpoint. U.S.C.A.Const. Amends. 5, 14.

[9] Constitutional Law ⚖251.5
92k251.5 Most Cited Cases
(Formerly 92k251)
Procedural due process rules are shaped by risk of error inherent in truth-finding process as applied to generality of cases, not rare exceptions. U.S.C.A.Const. Amends. 5, 14.

[10] Constitutional Law ⚖318(1)
92k318(1) Most Cited Cases
Financial cost alone is not controlling weight in determining whether due process requires particular procedural safeguard prior to some administrative decision; but government's interest, and hence that of public, in conserving scarce fiscal and administrative resources, is factor which must be weighed. U.S.C.A.Const. Amends. 5, 14.

[11] Constitutional Law ⚖251.6
92k251.6 Most Cited Cases
(Formerly 92k309(1), 92k305(2))
Essence of due process is requirement that person in jeopardy of serious loss be given notice of case against him and opportunity to meet it; all that is necessary is that procedure be tailored, in light of decision to be made, to capacities and circumstances of those who are to be heard, to insure that they are given meaningful opportunity to present their case. U.S.C.A.Const. Amends. 5, 14.

****895 *319** Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

In order to establish initial and continued entitlement to disability benefits under the Social Security Act (Act), a worker must demonstrate that, inter alia, he is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . ." The worker bears the continuing burden of showing, by means of "medically acceptable . . . techniques" that his impairment is of such severity that he cannot perform his previous work or any other kind of gainful work. A state agency makes the continuing assessment of the worker's eligibility for benefits, obtaining information from the worker and his sources of medical treatment. The agency may arrange for an independent medical examination to resolve conflicting information. If the agency's tentative assessment of the beneficiary's condition differs from his own, the beneficiary is informed that his benefits may be terminated, is provided a

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summary of the evidence, and afforded an opportunity to review the agency's evidence. The state agency then makes a final determination, which is reviewed by the Social Security Administration (SSA). If the SSA accepts the agency determination it gives written notification to the beneficiary of the reasons for the decision and of his right to de novo state agency reconsideration. Upon acceptance by the SSA, benefits are terminated effective two months after the month in which recovery is found to have occurred. If, after reconsideration by the state agency and SSA review, the decision remains adverse to the recipient, he is notified of his right to an evidentiary hearing before an SSA administrative law judge. If an adverse decision results, the recipient may request discretionary review by the SSA Appeals Council, and finally may obtain judicial review. If it is determined after benefits are terminated that the claimant's disability extended beyond the date of cessation initially established, he is entitled to retroactive payments. Retroactive adjustments are also made for overpayments. A few years after respondent was first awarded disability benefits he received and completed a questionnaire ***320** from the monitoring state agency. After considering the information contained therein and obtaining reports from his doctor and an independent medical consultant, the agency wrote respondent that it had tentatively determined that his disability had ceased in May 1972 and advised him that he might request a reasonable time to furnish additional information. In a reply letter respondent disputed one characterization of his medical condition and indicated that the agency had enough evidence to establish his disability. The agency then made its final determination reaffirming its tentative decision. This determination was accepted by the SSA, which notified respondent in July that his benefits would end after that month and that he had a right to state agency reconsideration within six months. Instead of requesting such reconsideration respondent brought this action challenging the constitutionality of the procedures for terminating disability benefits and seeking reinstatement of benefits pending a hearing. The District Court, relying in part on Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287, held that the termination procedures violated procedural due process and concluded that prior to termination of benefits respondent was entitled to an evidentiary hearing of the type provided welfare beneficiaries under Title IV of the Act. The Court of Appeals affirmed. Petitioner contends, inter alia, that the District Court is barred from considering respondent's action by Weinberger v. Salfi, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522, which held that district courts are precluded from exercising jurisdiction over an action seeking a review of a decision of the Secretary of Health, Education, and Welfare regarding benefits under the Act except ****896** as provided in 42 U.S.C. s 405(g), which grants jurisdiction only to review a "final" decision of the Secretary made after a hearing to which he was a party. Held :

1. The District Court had jurisdiction over respondent's constitutional claim, since the denial of his request for benefits was a final decision with respect to that claim for purposes of s 405(g) jurisdiction. Pp. 898-902.

(a) The s 405(g) finality requirement consists of the waivable requirement that the administrative remedies prescribed by the Secretary be exhausted and the nonwaivable requirement that a claim for benefits shall have been presented to the Secretary. Respondent's answers to the questionnaire and his letter to the state agency specifically presented the claim that his benefits should not be terminated because he was still disabled, and thus satisfied the nonwaivable requirement. Pp. 899-901.

***321** (b) Although respondent concededly did not exhaust the Secretary's internal-review procedures and ordinarily only the Secretary has the power to waive exhaustion, this is a case where the claimant's interest in having a particular issue promptly resolved is so great that deference to the Secretary's judgment is inappropriate. The facts that respondent's constitutional challenge was collateral to his substantive claim of entitlement and that (contrary to the situation in Salfi) he colorably claimed that an erroneous termination would damage him in a way not compensable through retroactive payments warrant the conclusion that the denial of his claim to continued benefits was a sufficiently "final decision" with respect to his constitutional claim to satisfy the statutory exhaustion requirement. Pp. 900- 902.

2. An evidentiary hearing is not required prior to

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the termination of Social Security disability payments and the administrative procedures prescribed under the Act fully comport with due process. Pp. 901-910.

(a) "(D)ue process is flexible and calls for such procedural protections as the particular situation demands," Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484. Resolution of the issue here involving the constitutional sufficiency of administrative procedures prior to the initial termination of benefits and pending review, requires consideration of three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and (3) the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail. Pp. 901-903.

(b) The private interest that will be adversely affected by an erroneous termination of benefits is likely to be less in the case of a disabled worker than in the case of a welfare recipient, like the claimants in Goldberg, supra. Eligibility for disability payments is not based on financial need, and although hardship may be imposed upon the erroneously terminated disability recipient, his need is likely less than the welfare recipient. In view of other forms of government assistance available to the terminated disability recipient, there is less reason than in Goldberg to depart from the ordinary principle that something less than an evidentiary hearing is sufficient prior to adverse administrative action. Pp. 905-907.

(c) The medical assessment of the worker's condition implicates ***322** a more sharply focused and easily documented decision than the typical determination of welfare entitlement. The decision whether to discontinue disability benefits will normally turn upon "routine, standard, and unbiased medical reports by physician specialists," Richardson v. Perales, 402 U.S. 389, 404, 91 S.Ct. 1420, 1428-1429, 28 L.Ed.2d 842. In a disability situation the potential value of an evidentiary hearing is thus substantially less than in the welfare context. Pp. 907-908.

(d) Written submissions provide the disability recipient with an effective means of communicating his case to the decision-maker. The detailed questionnaire identifies ****897** with particularity the information relevant to the entitlement decision. Information critical to the decision is derived directly from medical sources. Finally, prior to termination of benefits, the disability recipient or his representative is afforded full access to the information relied on by the state agency, is provided the reasons underlying its tentative assessment, and is given an opportunity to submit additional arguments and evidence. Pp. 907, 908.

(e) Requiring an evidentiary hearing upon demand in all cases prior to the termination of disability benefits would entail fiscal and administrative burdens out of proportion to any countervailing benefits. The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances, and here where the prescribed procedures not only provide the claimant with an effective process for asserting his claim prior to any administrative action but also assure a right to an evidentiary hearing as well as subsequent judicial review before the denial of his claim becomes final, there is no deprivation of procedural due process. Pp. 909-910.

493 F.2d 1230, reversed.

***323** Donald E. Earls, Norton, Va., for respondent.

Mr. Justice POWELL delivered the opinion of the Court.

The issue in this case is whether the Due Process Clause of the Fifth Amendment requires that prior to the termination of Social Security disability benefit payments the recipient be afforded an opportunity for an evidentiary hearing.

I

Cash benefits are provided to workers during periods in which they are completely disabled under the disability insurance benefits program created by the 1956 amendments to Title II of the Social Security Act. 70 Stat. 815, 42 U.S.C. s 423. [FN1] Respondent Eldridge was first awarded benefits in

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June 1968. In March 1972, he received a questionnaire from the state agency charged with monitoring his medical condition. Eldridge completed *324 the questionnaire, indicating that his condition had not improved and identifying the medical sources, including physicians, from whom he had received treatment recently. The state agency then obtained reports from his physician and a psychiatric consultant. After considering these reports and other information in his file the agency informed Eldridge by letter that it had made a tentative determination that his disability had ceased in May 1972. The letter included a statement of reasons for the proposed termination of benefits, and advised Eldridge that he might request reasonable time in which to obtain and submit additional information pertaining to his condition.

> FN1. The program is financed by revenues derived from employee and employer payroll taxes. 26 U.S.C. ss 3101(a), 3111(a); 42 U.S.C. s 401(b). It provides monthly benefits to disabled persons who have worked sufficiently long to have an insured status, and who have had substantial work experience in a specified interval directly preceding the onset of disability. 42 U.S.C. ss 423(c)(1)(A) and (B). Benefits also are provided to the worker's dependents under specified circumstances. ss 402(b)-(d). When the recipient reaches age 65 his disability benefits are automatically converted to retirement benefits. ss 416(i)(2)(D), 423(a)(1). In fiscal 1974 approximately 3,700,000 persons received assistance under the program. Social Security Administration, The Year in Review 21 (1974).

In his written response, Eldridge disputed one characterization of his medical condition and indicated that the agency already had enough evidence to establish his disability. [FN2] The state agency then made its final determination that he had ceased to be disabled in May 1972. This determination was accepted by the Social Security Administration (**898 SSA), which notified Eldridge in July that his benefits would terminate after that month. The notification also advised him of his right to seek reconsideration by the state agency of this initial determination within six months.

> FN2. Eldridge originally was disabled due to chronic anxiety and back strain. He subsequently was found to have diabetes. The tentative determination letter indicated that aid would be terminated because available medical evidence indicated that his diabetes was under control, that there existed no limitations on his back movements which would impose severe functional restrictions, and that he no longer suffered emotional problems that would preclude him from all work for which he was qualified. App. 12-13. In his reply letter he claimed to have arthritis of the spine rather than a strained back.

Instead of requesting reconsideration Eldridge commenced this action challenging the constitutional validity *325 of the administrative procedures established by the Secretary of Health, Education, and Welfare for assessing whether there exists a continuing disability. He sought an immediate reinstatement of benefits pending a hearing on the issue of his disability. [FN3] 361 F.Supp. 520 (W.D.Va.1973). The Secretary moved to dismiss on the grounds that Eldridge's benefits had been terminated in accordance with valid administrative regulations and procedures and that he had failed to exhaust available remedies. In support of his contention that due process requires a pretermination hearing, Eldridge relied exclusively upon this Court's decision in Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), which established a right to an "evidentiary hearing" prior to termination of welfare benefits. [FN4] The Secretary contended that Goldberg was not controlling since eligibility for disability benefits, unlike eligibility for welfare benefits, is not based on financial need and since issues of credibility and veracity do not play a significant role in the disability entitlement decision, which turns primarily on medical evidence.

> FN3. The District Court ordered reinstatement of Eldridge's benefits pending its final disposition on the merits.

> FN4. In Goldberg the Court held that the

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pretermination hearing must include the following elements: (1) "timely and adequate notice detailing the reasons for a proposed termination"; (2) "an effective opportunity (for the recipient) to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally"; (3) retained counsel, if desired; (4) an "impartial" decisionmaker; (5) a decision resting "solely on the legal rules and evidence adduced at the hearing"; (6) a statement of reasons for the decision and the evidence relied on. 397 U.S., at 266-271, 90 S.Ct., at 1019-1022. In this opinion the term "evidentiary hearing" refers to a hearing generally of the type required in Goldberg.

The District Court concluded that the administrative procedures pursuant to which the Secretary had terminated Eldridge's benefits abridged his right to procedural ***326** due process. The court viewed the interest of the disability recipient in uninterrupted benefits as indistinguishable from that of the welfare recipient in Goldberg. It further noted that decisions subsequent to Goldberg demonstrated that the due process requirement of pretermination hearings is not limited to situations involving the deprivation of vital necessities. See Fuentes v. Shevin, 407 U.S. 67, 88-89, 92 S.Ct. 1983, 1998- 1999, 32 L.Ed.2d 556 (1972); Bell v. Burson, 402 U.S. 535, 539, 91 S.Ct. 1586, 1589, 29 L.Ed.2d 90 (1971). Reasoning that disability determinations may involve subjective judgments based on conflicting medical and nonmedical evidence, the District Court held that prior to termination of benefits Eldridge had to be afforded an evidentiary hearing of the type required for welfare beneficiaries under Title IV of the Social Security Act. 361 F.Supp., at 528. [FN5] Relying entirely upon the District Court's opinion, the Court of Appeals for the Fourth Circuit affirmed the injunction barring termination of Eldridge's benefits prior to an evidentiary hearing. 493 F.2d 1230 (1974). [FN6] We reverse.

FN5. The HEW regulations direct that each state plan under the federal categorical assistance programs must provide for pretermination hearings containing specified procedural safeguards, which include all of the Goldberg requirements. See 45 CFR s 205.10(a) (1975); n. 4, supra.

FN6. The Court of Appeals for the Fifth Circuit, simply noting that the issue had been correctly decided by the District Court in this case, reached the same conclusion in Williams v. Weinberger, 494 F.2d 1191 (1974), cert. pending, No. 74-205.

****899** II

[1] At the outset we are confronted by a question as to whether the District Court had jurisdiction over this suit. The Secretary contends that our decision last Term in Weinberger v. Salfi, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975), bars the District Court from considering Eldridge's action. Salfi was an action challenging the Social Security Act's ***327** duration-of-relationship eligibility requirements for surviving wives and stepchildren of deceased wage earners. We there held that 42 U.S.C. s 405(h) [FN7] precludes federal-question jurisdiction in an action challenging denial of claimed benefits. The only avenue for judicial review is 42 U.S.C. s 405(g) , which requires exhaustion of the administrative remedies provided under the Act as a jurisdictional prerequisite.

FN7. Title 42 U.S.C. s 405(h) provides in full:
"(h) Finality of Secretary's decision.
"The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter."

Section 405(g) in part provides:
"Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy,

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may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow." [FN8]

FN8. Section 405(g) further provides:
Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. . . . The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive . . . ."

***328** On its face s 405(g) thus bars judicial review of any denial of a claim of disability benefits until after a "final decision" by the Secretary after a "hearing." It is uncontested that Eldridge could have obtained full administrative review of the termination of his benefits, yet failed even to seek reconsideration of the initial determination. Since the Secretary has not "waived" the finality requirement as he had in Salfi, supra, at 767, 95 S.Ct., at 2467-2468, he concludes that Eldridge cannot properly invoke s 405(g) as a basis for jurisdiction. We disagree.

Salfi identified several conditions which must be satisfied in order to obtain judicial review under s 405(g). Of these, the requirement that there be a final decision by the Secretary after a hearing was regarded as "central to the requisite grant of subject-matter jurisdiction . . .." 422 U.S., at 764, 95 S.Ct., at 2466. [FN9] Implicit in Salfi however, is the principle that this condition consists of two elements, only one of which is purely "jurisdictional" in the sense that it cannot be "waived" by the Secretary in a particular case. The waivable element is the requirement that the administrative remedies prescribed by the Secretary be exhausted. The nonwaivable element is the requirement that a claim for benefits shall have been presented to the Secretary. Absent such a claim there can be no "decision" of any type. And some decision by the Secretary is clearly required by the statute.

FN9. The other two conditions are (1) that the civil action be commenced within 60 days after the mailing of notice of such decision, or within such additional time as the Secretary may permit, and (2) that the action be filed in an appropriate district court. These two requirements specify a statute of limitations and appropriate venue, and are waivable by the parties. Salfi, 422 U.S., at 763-764, 95 S.Ct., at 2465-2466. As in Salfi no question as to whether Eldridge satisfied these requirements was timely raised below, see Fed.Rules Civ.Proc. 8(c), 12(h)(1), and they need not be considered here.

***329** ****900** That this second requirement is an essential and distinct precondition for s 405(g) jurisdiction is evident from the different conclusions that we reached in Salfi with respect to the named appellees and the unnamed members of the class. As to the latter the complaint was found to be jurisdictionally deficient since it "contain(ed) no allegations that they have even filed an application with the Secretary . . . ." 422 U.S., at 764, 95 S.Ct., at 2466. With respect to the named appellees, however, we concluded that the complaint was sufficient since it alleged that they had "fully presented their claims for benefits 'to their district Social Security Office and, upon denial, to the Regional Office for reconsideration.' " Id., at 764-765, 95 S.Ct., at 2466. Eldridge has fulfilled this crucial prerequisite. Through his answers to the state agency questionnaire, and his letter in response to the tentative determination that his disability had ceased, he specifically presented the claim that his benefits should not be terminated because he was still disabled. This claim was denied by the state agency and its decision was accepted by the SSA.

The fact that Eldridge failed to raise with the Secretary his constitutional claim to a pretermination hearing is not controlling. [FN10] As construed in Salfi, s 405(g) requires only that

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there be a "final decision" by the Secretary with respect to the claim of entitlement to benefits. Indeed, the named appellees in Salfi did not present their constitutional claim to the Secretary. Weinberger v. Salfi, O.T.1974, No. 74-214, App. 11, 17-21. The situation here is not identical to Salfi, for, while the ***330** Secretary had no power to amend the statute alleged to be unconstitutional in that case, he does have authority to determine the timing and content of the procedures challenged here. 42 V.S.C. s 405(a). We do not, however, regard this difference as significant. It is unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context. The Secretary would not be required even to consider such a challenge.

> FN10. If Eldridge had exhausted the full set of available administrative review procedures, failure to have raised his constitutional claim would not bar him from asserting it later in a district court. Cf. Flemming v. Nestor, 363 U.S. 603, 607, 80 S.Ct. 1367, 1370-1371, 4 L.Ed.2d 1435 (1960).

[2] As the nonwaivable jurisdictional element was satisfied, we next consider the waivable element. The question is whether the denial of Eldridge's claim to continued benefits was a sufficiently "final" decision with respect to his constitutional claim to satisfy the statutory exhaustion requirement. Eldridge concedes that he did not exhaust the full set of internal-review procedures provided by the Secretary. See 20 CFR ss 404.910, 404.916, 404.940 (1975). As Salfi recognized, the Secretary may waive the exhaustion requirement if he satisfies himself, at any stage of the administrative process, that no further review is warranted either because the internal needs of the agency are fulfilled or because the relief that is sought is beyond his power to confer. Salfi suggested that under s 405(g) the power to determine when finality has occurred ordinarily rests with the Secretary since ultimate responsibility for the integrity of the administrative program is his. But cases may arise where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate. This is such a case.

Eldridge's constitutional challenge is entirely collateral to his substantive claim of entitlement. Moreover, there ***331** is a crucial distinction between the nature of the constitutional claim asserted here and that raised in Salfi. A claim to a predeprivation hearing as a matter of constitutional right rests on the proposition that full relief cannot be obtained at a postdeprivation hearing. ****901** See Regional Rail Reorganization Act Cases, 419 U.S. 102, 156, 95 S.Ct. 335, 365, 42 L.Ed.2d 320 (1974) . In light of the Court's prior decisions, see, e. g., Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), Eldridge has raised at least a colorable claim that because of his physical condition and dependency upon the disability benefits, an erroneous termination would damage him in a way not recompensable through retroactive payments. [FN11] Thus, unlike the situation in Salfi, denying Eldridge's substantive ***332** claim "for other reasons" or upholding it "under other provisions" at the post-termination stage, 422 U.S., at 762, 95 S.Ct., at 2465, would not answer his constitutional challenge.

> FN11. Decisions in different contexts have emphasized that the nature of the claim being asserted and the consequences of deferment of judicial review are important factors in determining whether a statutory requirement of finality has been satisfied. The role these factors may play is illustrated by the intensely "practical" approach which the Court has adopted, Cohen v. Beneficial Ind. Loan Corp., 337 U.S. 541, 546, 69 S.Ct. 1221, 1225-1226, 93 L.Ed. 1528 (1949), when applying the finality requirements of 28 U.S.C. s 1291, which grants jurisdiction to courts of appeals to review all "final decisions" of the district courts, and 28 U.S.C. s 1257, which empowers this Court to review only "final judgments" of state courts. See, e. g., Harris v. Washington, 404 U.S. 55, 92 S.Ct. 183, 30 L.Ed.2d 212 (1971); Construction Laborers v. Curry, 371 U.S. 542, 549-550, 83 S.Ct. 531, 536, 537, 9 L.Ed.2d 514 (1963); Mercantile Nat. Bank v. Langdeau, 371 U.S. 555, 557-558, 83

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S.Ct. 520, 521-522 (1963); Cohen v. Beneficial Ind. Loan Corp., supra, 337 U.S., at 545- 546, 69 S.Ct., at 1225-1226. To be sure, certain of the policy considerations implicated in ss 1257 and 1291 cases are different from those that are relevant here. Compare Construction Laborers, supra, 371 U.S., at 550, 83 S.Ct., at 536-537; Mercantile Nat. Bank, supra, 371 U.S., at 558, 83 S.Ct., at 522, with McKart v. United States, 395 U.S. 185, 193-195, 89 S.Ct. 1657, 1662-1663, 23 L.Ed.2d 194 (1969); L. Jaffe, Judicial Control of Administrative Action 424-426 (1965). But the core principle that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered remains applicable.

We conclude that the denial of Eldridge's request for benefits constitutes a final decision for purposes of s 405(g) jurisdiction over his constitutional claim. We now proceed to the merits of that claim. [FN12]

FN12. Given our conclusion that jurisdiction in the District Court was proper under s 405(g), we find it unnecessary to consider Eldridge's contention that notwithstanding s 405(h) there was jurisdiction over his claim under the mandamus statute, 28 U.S.C. s 1361, or the Administrative Procedure Act, 5 U.S.C. s 701 et seq.

III
A

[3] Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. The Secretary does not contend that procedural due process is inapplicable to terminations of Social Security disability benefits. He recognizes, as has been implicit in our prior decisions, e. g., Richardson v. Belcher, 404 U.S. 78, 80-81, 92 S.Ct. 254, 256-257, 30 L.Ed.2d 231 (1971); Richardson v. Perales, 402 U.S. 389, 401-402, 91 S.Ct. 1420, 1427-1428, 28 L.Ed.2d 842 (1971); Flemming v. Nestor, 363 U.S. 603, 611, 80 S.Ct. 1367, 1372-1373, 4 L.Ed.2d 1435 (1960), that the interest of an individual in continued receipt of these benefits is a statutorily created "property" interest protected by the Fifth Amendment. Cf. Arnett v. Kennedy, 416 U.S. 134, 166, 94 S.Ct. 1633, 1650, 40 L.Ed.2d 15 (Powell, J., concurring in part) (1974); Board of Regents v. Roth, 408 U.S. 564, 576-578, 92 S.Ct. 2701, 2708-2710, 33 L.Ed.2d 548 (1972); Bell v. Burson, 402 U.S., at 539, 91 S.Ct., at 1589; Goldberg v. Kelly, 397 U.S., at 261-262, 90 S.Ct., at 1016-1017. Rather, the Secretary contends that the existing administrative procedures, detailed below, provide all the process ***333** that is constitutionally due before a recipient can be deprived of that interest.

****902** [4] This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. Wolff v. McDonnell, 418 U.S. 539, 557-558, 94 S.Ct. 2963, 2975-2976, 41 L.Ed.2d 935 (1974). See, e. g. Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 596-597, 51 S.Ct. 608, 611-612, 75 L.Ed. 1289 (1931). See also Dent v. West Virginia, 129 U.S. 114, 124-125, 9 S.Ct. 231, 234, 32 L.Ed. 623 (1889). The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). See Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). Eldridge agrees that the review procedures available to a claimant before the initial determination of ineligibility becomes final would be adequate if disability benefits were not terminated until after the evidentiary hearing stage of the administrative process. The dispute centers upon what process is due prior to the initial termination of benefits, pending review.

In recent years this Court increasingly has had occasion to consider the extent to which due

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process requires an evidentiary hearing prior to the deprivation of some type of property interest even if such a hearing is provided thereafter. In only one case, Goldberg v. Kelly, 397 U.S., at 266- 271, 90 S.Ct., at 1019-1022, 25 L.Ed.2d 287, has the Court held that a hearing closely approximating a judicial trial is necessary. In other cases requiring some type of pretermination hearing as a matter of constitutional right the Court has spoken sparingly about the requisite procedures. ***334**SniaDachv. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969), involving garnishment of wages, was entirely silent on the matter. In Fuentes v. Shevin, 407 U.S., at 96-97, 92 S.Ct., at 2002-2003, 32 L.Ed.2d 556, the Court said only that in a replevin suit between two private parties the initial determination required something more than an ex parte proceeding before a court clerk. Similarly, Bell v. Burson, supra, at 540, 91 S.Ct., at 1590, 29 L.Ed.2d 90, held, in the context of the revocation of a state-granted driver's license, that due process required only that the prerevocation hearing involve a probable-cause determination as to the fault of the licensee, noting that the hearing "need not take the form of a full adjudication of the question of liability." See also North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 607, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975). More recently, in Arnett v. Kennedy, supra, we sustained the validity of procedures by which a federal employee could be dismissed for cause. They included notice of the action sought, a copy of the charge, reasonable time for filing a written response, and an opportunity for an oral appearance. Following dismissal, an evidentiary hearing was provided. 416 U.S., at 142-146, 94 S.Ct., at 1638-1640.

[5][6] These decisions underscore the truism that " '(d)ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Cafeteria Workers v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). "(D)ue process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. Arnett v. Kennedy, supra, 416 U.S., at 167-168, 94 S.Ct., at 1650-1651 (Powell, J., concurring in part); Goldberg v. Kelly, supra, 397 U.S., at 263-266, 90 S.Ct., at 1018-1020; ****903** Cafeteria Workers v. McElroy, supra, 367 U.S., at 895, 81 S.Ct., at 1748-1749. More precisely, our prior decisions ***335** indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, e. g., Goldberg v. Kelly, supra, 397 U.S., at 263-271, 90 S.Ct., at 1018-1022.

We turn first to a description of the procedures for the termination of Social Security disability benefits and thereafter consider the factors bearing upon the constitutional adequacy of these procedures.

B

The disability insurance program is administered jointly by state and federal agencies. State agencies make the initial determination whether a disability exists, when it began, and when it ceased. 42 U.S.C. s 421(a). [FN13] The standards applied and the procedures followed are prescribed by the Secretary, see s 421(b), who has delegated his responsibilities and powers under the Act to the SSA. See 40 Fed.Reg. 4473 (1975).

FN13. In all but six States the state vocational rehabilitation agency charged with administering the state plan under the Vocational Rehabilitation Act of 1920, 41 Stat. 735, as amended, 29 U.S.C. s 701 et seq. (1970 ed., Supp. III), acts as the "state agency" for purposes of the disability insurance program. Staff of the House Comm. on Ways and Means, Report on the Disability Insurance Program, 93d Cong., 2d Sess., 148 (1974). This assignment of responsibility was intended to encourage rehabilitation contacts for disabled workers

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and to utilize the well-established relationships of the local rehabilitation agencies with the medical profession. H.R.Rep.No.1698, 83d Cong., 2d Sess., 23-24 (1954).

***336** In order to establish initial and continued entitlement to disability benefits a worker must demonstrate that he is unable

"to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months . . . ." 42 U.S.C. s 423(d)(1)(A).

To satisfy this test the worker bears a continuing burden of showing, by means of "medically acceptable clinical and laboratory diagnostic techniques," s 423(d)(3), that he has a physical or mental impairment of such severity that

"he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work." s 423(d)(2)(A). [FN14]

FN14. Work which "exists in the national economy" is in turn defined as "work which exists in significant numbers either in the region where such individual lives or in several regions of the country." s 423(d)(2)(A).

The principal reasons for benefits terminations are that the worker is no longer disabled or has returned to work. As Eldridge's benefits were terminated because he was determined to be no longer disabled, we consider only the sufficiency of the procedures involved in such cases. [FN15]

FN15. Because the continuing-disability investigation concerning whether a claimant has returned to work is usually done directly by the SSA Bureau of Disability Insurance, without any state agency involvement, the administrative procedures prior to the post-termination evidentiary hearing differ from those involved in cases of possible medical recovery. They are similar, however, in the important respect that the process relies principally on written communications and there is no provision for an evidentiary hearing prior to the cutoff of benefits. Due to the nature of the relevant inquiry in certain types of cases, such as those involving self-employment and agricultural employment, the SSA office nearest the beneficiary conducts an oral interview of the beneficiary as part of the pretermination process. SSA Claims Manual (CM) s 6705.2(c).

***337** ****904** The continuing-eligibility investigation is made by a state agency acting through a "team" consisting of a physician and a nonmedical person trained in disability evaluation. The agency periodically communicates with the disabled worker, usually by mail in which case he is sent a detailed questionnaire or by telephone, and requests information concerning his present condition, including current medical restrictions and sources of treatment, and any additional information that he considers relevant to his continued entitlement to benefits. CM s 6705.1; Disability Insurance State Manual (DISM) s 353.3 (TL No. 137, Mar. 5, 1975). [FN16]

FN16. Information is also requested concerning the recipient's belief as to whether he can return to work, the nature and extent of his employment during the past year, and any vocational services he is receiving.

Information regarding the recipient's current condition is also obtained from his sources of medical treatment. DISM s 353.4. If there is a conflict between the information provided by the beneficiary and that obtained from medical sources such as his physician, or between two sources of treatment, the agency may arrange for an examination by an independent consulting physician. [FN17] Ibid. Whenever the agency's tentative assessment of the beneficiary's condition differs from his ***338** own assessment, the beneficiary is informed that benefits may be

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terminated, provided a summary of the evidence upon which the proposed determination to terminate is based, and afforded an opportunity to review the medical reports and other evidence in his case file. [FN18] He also may respond in writing and submit additional evidence. Id., s 353.6.

FN17. All medical-source evidence used to establish the absence of continuing disability must be in writing, with the source properly identified. DISM s 353.4C.

FN18. The disability recipient is not permitted personally to examine the medical reports contained in his file. This restriction is not significant since he is entitled to have any representative of his choice, including a lay friend or family member, examine all medical evidence. CM s 7314. See also 20 CFR s 401.3(a)(2) (1975). The Secretary informs us that this curious limitation is currently under review.

The state agency then makes its final determination, which is reviewed by an examiner in the SSA Bureau of Disability Insurance. 42 U.S.C. s 421(c); CM ss 6701(b), (c). [FN19] If, as is usually the case, the SSA accepts the agency determination it notifies the recipient in writing, informing him of the reasons for the decision, and of his right to seek de novo reconsideration by the state agency. 20 CFR ss 404.907, 404.909 (1975). [FN20] Upon acceptance by the SSA, benefits are terminated effective two months after the month in which medical recovery is found to have occurred. 42 U.S.C. (Supp. III) s 423(a) (1970 ed., Supp. III).

FN19. The SSA may not itself revise the state agency's determination in a manner more favorable to the beneficiary. If, however, it believes that the worker is still disabled, or that the disability lasted longer than determined by the state agency, it may return the file to the agency for further consideration in light of the SSA's views. The agency is free to reaffirm its original assessment.

FN20. The reconsideration assessment is initially made by the state agency, but usually not by the same persons who considered the case originally. R. Dixon, Social Security Disability and Mass Justice 32 (1973). Both the recipient and the agency may adduce new evidence.

***339** If the recipient seeks reconsideration by the state agency and the determination is adverse, the SSA reviews the reconsideration determination and notifies the recipient of the decision. He then has a right to an evidentiary hearing before an SSA administrative law judge. 20 CFR ss 404.917, 404.927 (1975). The hearing is nonadversary, ****905** and the SSA is not represented by counsel. As at all prior and subsequent stages of the administrative process, however, the claimant may be represented by counsel or other spokesmen. s 404.934. If this hearing results in an adverse decision, the claimant is entitled to request discretionary review by the SSA Appeals Council, s 404.945, and finally may obtain judicial review. 42 U.S.C. s 405(g); 20 CFR s 404.951 (1975). [FN21]

FN21. Unlike all prior levels of review, which are de novo, the district court is required to treat findings of fact as conclusive if supported by substantial evidence. 42 U.S.C. s 405(g).

Should it be determined at any point after termination of benefits, that the claimant's disability extended beyond the date of cessation initially established, the worker is entitled to retroactive payments. 42 U.S.C. s 404. Cf. s 423(b); 20 CFR ss 404.501, 404.503, 404.504 (1975). If, on the other hand, a beneficiary receives any payments to which he is later determined not to be entitled, the statute authorizes the Secretary to attempt to recoup these funds in specified circumstances. 42 U.S.C. s 404. [FN22]

FN22. The Secretary may reduce other payments to which the beneficiary is entitled, or seek the payment of a refund, unless the beneficiary is "without fault" and such adjustment or recovery would defeat the purposes of the Act or be "against equity and good conscience." 42 U.S.C. s 404(b). See generally 20 CFR ss 404.501-404.515 (1975).

C

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[7] Despite the elaborate character of the administrative procedures provided by the Secretary, the courts *340 below held them to be constitutionally inadequate, concluding that due process requires an evidentiary hearing prior to termination. In light of the private and governmental interests at stake here and the nature of the existing procedures, we think this was error.

Since a recipient whose benefits are terminated is awarded full retroactive relief if he ultimately prevails, his sole interest is in the uninterrupted receipt of this source of income pending final administrative decision on his claim. His potential injury is thus similar in nature to that of the welfare recipient in Goldberg, see 397 U.S., at 263-264, 90 S.Ct., at 1018-1019, the nonprobationary federal employee in Arnett, see 416 U.S., at 146, 94 S.Ct., at 1640, 1641, and the wage earner in Sniadach. See 395 U.S., at 341-342, 89 S.Ct., at 1822-1823. [FN23]

> FN23. This, of course, assumes that an employee whose wages are garnisheed erroneously is subsequently able to recover his back wages.

Only in Goldberg has the Court held that due process requires an evidentiary hearing prior to a temporary deprivation. It was emphasized there that welfare assistance is given to persons on the very margin of subsistence:

> "The crucial factor in this context a factor not present in the case of . . . virtually anyone else whose governmental entitlements are ended is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits." 397 U.S., at 264, 90 S.Ct., at 1018 (emphasis in original).

Eligibility for disability benefits, in contrast, is not based upon financial need. [FN24] Indeed, it is wholly unrelated to *341 the worker's income or support from many other sources, such as earnings of other family members, workmen's compensation awards, [FN25] tort claims awards, savings, private **906 insurance, public or private pensions, veterans' benefits, food stamps, public assistance, or the "many other important programs, both public and private, which contain provisions for disability payments affecting a substantial portion of the work force . . . ." Richardson v. Belcher, 404 U.S., at 85-87, 92 S.Ct., at 259 (Douglas, J., dissenting). See Staff of the House Committee on Ways and Means, Report on the Disability Insurance Program, 93d Cong., 2d Sess., 9-10, 419-429 (1974) (hereinafter Staff Report).

> FN24. The level of benefits is determined by the worker's average monthly earnings during the period prior to disability, his age, and other factors not directly related to financial need, specified in 42 U.S.C. s 415 (1970 ed., Supp. III). See s 423(a)(2).

> FN25. Workmen's compensation benefits are deducted in part in accordance with a statutory formula. 42 U.S.C. s 424a (1970 ed., Supp. III); 20 CFR s 404.408 (1975); see Richardson v. Belcher, 404 U.S. 78, 92 S.Ct. 254, 30 L.Ed.2d 231 (1971).

[8] As Goldberg illustrates, the degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process. Cf. Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). The potential deprivation here is generally likely to be less than in Goldberg, although the degree of difference can be overstated. As the District Court emphasized, to remain eligible for benefits a recipient must be "unable to engage in substantial gainful activity." 42 U.S.C. s 423; 361 F.Supp., at 523. Thus, in contrast to the discharged federal employee in Arnett, there is little possibility that the terminated recipient will be able to find even temporary employment to ameliorate the interim loss.

As we recognized last Term in Fusari v. Steinberg, 419 U.S. 379, 389, 95 S.Ct. 533, 540, 42 L.Ed.2d 521 (1975), "the possible length of wrongful deprivation of . . . benefits (also) is an important factor in assessing the impact of official action on the private interests." The Secretary concedes that the delay between *342 a request for a hearing before an administrative law judge and a decision on the claim is currently between 10 and 11 months. Since a terminated recipient must first obtain a reconsideration decision as a prerequisite to invoking his right to an evidentiary hearing, the delay between the actual cutoff of benefits and final

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decision after a hearing exceeds one year.

In view of the torpidity of this administrative review process, cf. id., at 383-384, 386, 95 S.Ct., at 536-537, 538, and the typically modest resources of the family unit of the physically disabled worker, [FN26] the hardship imposed upon the erroneously terminated disability recipient may be significant. Still, the disabled worker's need is likely to be less than that of a welfare recipient. In addition to the possibility of access to private resources, other forms of government assistance will become available where the termination of disability benefits places a worker or his family below the subsistence level. [FN27] See ***343**Arnett v. Kennedy, supra, 416 U.S., at 169, ****90**794 S.Ct., at 1651-1652 (Powell, J., concurring in part); id., at 201-202, 94 S.Ct., at 1667-1668 (White, J., concurring in part and dissenting in part). In view of these potential sources of temporary income, there is less reason here than in Goldberg to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action.

FN26. Amici cite statistics compiled by the Secretary which indicate that in 1965 the mean income of the family unit of a disabled worker was $3,803, while the median income for the unit was $2,836. The mean liquid assets i. e., cash, stocks, bonds of these family units was $4,862; the median was $940. These statistics do not take into account the family unit's nonliquid assets i. e., automobile, real estate, and the like. Brief for AFL-CIO et al. as Amici Curiae App. 4a. See n.29, infra.

FN27. Amici emphasize that because an identical definition of disability is employed in both the Title II Social Security Program and in the companion welfare system for the disabled, Supplemental Security Income (SSI), compare 42 U.S.C. s 423(d)(1) with s 1382c(a)(3) (1970 ed., Supp. III), the terminated disability-benefits recipient will be ineligible for the SSI Program. There exist, however, state and local welfare programs which may supplement the worker's income. In addition, the worker's household unit can qualify for food stamps if it meets the financial need requirements. See 7 U.S.C. ss 2013(c), 2014(b); 7 CFR s 271 (1975). Finally, in 1974, 480,000 of the approximately 2,000,000 disabled workers receiving Social Security benefits also received SSI benefits. Since financial need is a criterion for eligibility under the SSI program, those disabled workers who are most in need will in the majority of cases be receiving SSI benefits when disability insurance aid is terminated. And, under the SSI program, a pretermination evidentiary hearing is provided, if requested. 42 U.S.C. s 1383(c) (1970 ed., Supp. III); 20 CFR s 416.1336(c) (1975); 40 Fed.Reg. 1512 (1975); see Staff Report 346.

D

An additional factor to be considered here is the fairness and reliability of the existing pretermination procedures, and the probable value, if any, of additional procedural safeguards. Central to the evaluation of any administrative process is the nature of the relevant inquiry. See Mitchell v. W. T. Grant Co., 416 U.S. 600, 617, 94 S.Ct. 1895, 1905, 40 L.Ed.2d 406 (1974); Friendly, Some Kind of Hearing, 123 U.Pa.L.Rev. 1267, 1281 (1975). In order to remain eligible for benefits the disabled worker must demonstrate by means of "medically acceptable clinical and laboratory diagnostic techniques," 42 U.S.C. s 423(d)(3), that he is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . ." s 423(d)(1)(A) (emphasis supplied). In short, a medical assessment of the worker's physical or mental condition is required. This is a more sharply focused and easily documented decision than the typical determination of welfare entitlement. In the latter case, a wide variety of information may be deemed relevant, and issues of witness credibility and ***344** veracity often are critical to the decisionmaking process. Goldberg noted that in such circumstances "written submissions are a wholly unsatisfactory basis for decision." 397 U.S., at 269, 90 S.Ct., at 1021.

[9] By contrast, the decision whether to discontinue

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disability benefits will turn, in most cases, upon "routine, standard, and unbiased medical reports by physician specialists," Richardson v. Perales, 402 U.S., at 404, 91 S.Ct., at 1428, concerning a subject whom they have personally examined. [FN28] In Richardson the Court recognized the "reliability and probative worth of written medical reports," emphasizing that while there may be "professional disagreement with the medical conclusions" the "specter of questionable credibility and veracity is not present." Id., at 405, 407, 91 S.Ct., at 1428, 1430. To be sure, credibility and veracity may be a factor in the ultimate disability assessment in some cases. But procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions. The potential value of an evidentiary hearing, or even oral presentation to the decisionmaker, ***345** is substantially less in this context than in Goldberg.

> FN28. The decision is not purely a question of the accuracy of a medical diagnosis since the ultimate issue which the state agency must resolve is whether in light of the particular worker's "age, education, and work experience" he cannot "engage in any . . . substantial gainful work which exists in the national economy . . . ." 42 U.S.C. s 423(d)(2)(A). Yet information concerning each of these worker characteristics is amenable to effective written presentation. The value of an evidentiary hearing, or even a limited oral presentation, to an accurate presentation of those factors to the decisionmaker does not appear substantial. Similarly, resolution of the inquiry as to the types of employment opportunities that exist in the national economy for a physically impaired worker with a particular set of skills would not necessarily be advanced by an evidentiary hearing. Cf. K. Davis, Administrative Law Treatise s 7.06, at 429 (1958). The statistical information relevant to this judgment is more amenable to written than to oral presentation.

The decision in Goldberg also was based on the Court's conclusion that written submissions were an inadequate substitute for oral presentation because they did not provide an effective means for the recipient to communicate his case to the decisionmaker. Written submissions were viewed as an unrealistic option, for most recipients lacked the "educational attainment necessary to ****908** write effectively" and could not afford professional assistance. In addition, such submissions would not provide the "flexibility of oral presentations" or "permit the recipient to mold his argument to the issues the decision maker appears to regard as important." 397 U.S., at 269, 90 S.Ct., at 1021. In the context of the disability-benefits-entitlement assessment the administrative procedures under review here fully answer these objections.

The detailed questionnaire which the state agency periodically sends the recipient identifies with particularity the information relevant to the entitlement decision, and the recipient is invited to obtain assistance from the local SSA office in completing the questionnaire. More important, the information critical to the entitlement decision usually is derived from medical sources, such as the treating physician. Such sources are likely to be able to communicate more effectively through written documents than are welfare recipients or the lay witnesses supporting their cause. The conclusions of physicians often are supported by X-rays and the results of clinical or laboratory tests, information typically more amenable to written than to oral presentation. Cf. W. Gellhorn & C. Byse, Administrative Law Cases and Comments 860-863 (6th ed. 1974).

A further safeguard against mistake is the policy of allowing the disability recipient's representative full access ***346** to all information relied upon by the state agency. In addition, prior to the cutoff of benefits the agency informs the recipient of its tentative assessment, the reasons therefor, and provides a summary of the evidence that it considers most relevant. Opportunity is then afforded the recipient to submit additional evidence or arguments, enabling him to challenge directly the accuracy of information in his file as well as the correctness of the agency's tentative conclusions. These procedures, again as contrasted with those before the Court in Goldberg, enable the recipient to "mold" his argument to respond to the precise issues which the decisionmaker regards as crucial.

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Despite these carefully structured procedures, amici point to the significant reversal rate for appealed cases as clear evidence that the current process is inadequate. Depending upon the base selected and the line of analysis followed, the relevant reversal rates urged by the contending parties vary from a high of 58.6% For appealed reconsideration decisions to an overall reversal rate of only 3.3%. [FN29] Bare statistics rarely provide a satisfactory measure of the fairness of a decisionmaking process. Their adequacy is especially suspect here since ***347** the administrative review system is operated on an open-file basis. A recipient may always submit new evidence, and such submissions may result in additional medical examinations. Such fresh examinations were held in approximately 30% To 40% Of the appealed cases, in fiscal 1973, either at the reconsideration or evidentiary hearing stage of the administrative process. Staff Report 238. In this context, the value of reversal rate statistics as one means of evaluating the adequacy of the pretermination process is diminished. Thus, although we view such information as relevant, it is certainly not controlling in this case.

> FN29. By focusing solely on the reversal rate for appealed reconsideration determinations amici overstate the relevant reversal rate. As we indicated last Term in Fusari v. Steinberg, 419 U.S. 379, 383 n. 6, 95 S.Ct. 533, 536-537, 42 L.Ed.2d 521 (1975), in order fully to assess the reliability and fairness of a system of procedure, one must also consider the overall rate of error for all denials of benefits. Here that overall rate is 12.2%. Moreover, about 75% Of these reversals occur at the reconsideration stage of the administrative process. Since the median period between a request for reconsideration review and decision is only two months, Brief for AFL-CIO et al. as Amici Curiae App. 4a, the deprivation is significantly less than that concomitant to the lengthier delay before an evidentiary hearing. Netting out these reconsideration reversals, the overall reversal rate falls to 3.3%. See Supplemental and Reply Brief for Petitioner 14.

****909** E

In striking the appropriate due process balance the final factor to be assessed is the public interest. This includes the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing upon demand in all cases prior to the termination of disability benefits. The most visible burden would be the incremental cost resulting from the increased number of hearings and the expense of providing benefits to ineligible recipients pending decision. No one can predict the extent of the increase, but the fact that full benefits would continue until after such hearings would assure the exhaustion in most cases of this attractive option. Nor would the theoretical right of the Secretary to recover undeserved benefits result, as a practical matter, in any substantial offset to the added outlay of public funds. The parties submit widely varying estimates of the probable additional financial cost. We only need say that experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial.

[10] ***348** Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost. Significantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited. See Friendly, supra, 123 U.Pa.L.Rev., at 1276, 1303.

[11] But more is implicated in cases of this type than ad hoc weighing of fiscal and administrative burdens against the interests of a particular category of claimants. The ultimate balance involves a determination as to when, under our constitutional

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system, judicial-type procedures must be imposed upon administrative action to assure fairness. We reiterate the wise admonishment of Mr. Justice Frankfurter that differences in the origin and function of administrative agencies "preclude wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of courts." FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 143, 60 S.Ct. 437, 441, 84 L.Ed. 656 (1940). The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. The essence of due process is the requirement that "a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it." ***349**Joint Anti-Fascist Comm. v. McGrath, 341 U.S., at 171-172, 71 S.Ct., at 649. (Frankfurter, J., concurring). All that is necessary is that the procedures be tailored, in light of the decision to be made, to "the capacities and circumstances of those who are to be heard," Goldberg v. Kelly, 397 U.S., at 268-269, 90 S.Ct., at 1021 (footnote omitted), to insure that they are given a meaningful opportunity to present their case. In assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals. See Arnett v. Kennedy, 416 U.S., at 202, 94 S.Ct., at 1667-1668 (White, J., concurring in part and dissenting in part). This is especially so where, as here, the prescribed procedures not only provide the claimant with an effective process for ****910** asserting his claim prior to any administrative action, but also assure a right to an evidentiary hearing, as well as to subsequent judicial review, before the denial of his claim becomes final. Cf. Boddie v. Connecticut, 401 U.S. 371, 378, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971).

We conclude that an evidentiary hearing is not required prior to the termination of disability benefits and that the present administrative procedures fully comport with due process.

The judgment of the Court of Appeals is

Reversed.

Mr. Justice STEVENS took no part in the consideration or decision of this case.

Mr. Justice BRENNAN, with whom Mr. Justice MARSHALL concurs, dissenting.

For the reasons stated in my dissenting opinion in Richardson v. Wright, 405 U.S. 208, 212, 92 S.Ct. 788, 791, 31 L.Ed.2d 151 (1972), I agree with the District Court and the Court of Appeals that, prior to termination of benefits, Eldridge must be afforded ***350** an evidentiary hearing of the type required for welfare beneficiaries under Title IV of the Social Security Act, 42 U.S.C. s 601 et seq. See Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). I would add that the Court's consideration that a discontinuance of disability benefits may cause the recipient to suffer only a limited deprivation is no argument. It is speculative. Moreover, the very legislative determination to provide disability benefits, without any prerequisite determination of need in fact, presumes a need by the recipient which is not this Court's function to denigrate. Indeed, in the present case, it is indicated that because disability benefits were terminated there was a foreclosure upon the Eldridge home and the family's furniture was repossessed, forcing Eldridge, his wife, and their children to sleep in one bed. Tr. of Oral Arg. 39, 47-48. Finally, it is also no argument that a worker, who has been placed in the untenable position of having been denied disability benefits, may still seek other forms of public assistance.

George P. McLAUGHLIN, petitioner, v. Douglas VINZANT, Superintendent, Massachusetts Correctional Institution. No. 75-5671.

Former decision, 423 U.S. 1037, 423 U.S. 1037, 96 S.Ct. 573.

Facts and opinion, 1 Cir., 522 F.2d 448.

Jan. 26, 1976. Petition for rehearing denied.

Mr. Justice STEVENS took no part in the consideration or decision of this petition.

Briefs and Other Related Documents (Back to top)

• 1975 WL 173415 (Appellate Brief) Reply Brief

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for the Petitioner (Nov. 03, 1975)

• 1975 WL 173412 (Appellate Brief) Supplemental and Reply Brief for the Petitioner (Oct. Term 1975)

• 1975 WL 173414 (Appellate Brief) (May. 12, 1975)

• 1975 WL 173411 (Appellate Brief) Brief for the Respondent (May. 06, 1975)

• 1975 WL 173413 (Appellate Brief) Brief for the American Federation of Labor and Congress of Industrial Organizations, and for the Plaintiffs in Green, et al. v. Weinberger, et al. (D. D.C. No. 2219-73) as Amici Curiae (May. 01, 1975)

• 1975 WL 173410 (Appellate Brief) Brief for the Petitioner (Mar. 17, 1975)

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89 S.Ct. 1493
394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed.2d 1
(Cite as: 394 U.S. 814, 89 S.Ct. 1493)

Supreme Court of the United States

James L. MOORE et al., Appellants,
v.
Richard B. OGILVIE, etc., et al.

No. 620.

Argued March 27, 1969.
Decided May 5, 1969.

Declaratory judgment action seeking determination that sections of Illinois election statute were unconstitutional. The three-judge United States District Court for the Northern District of Illinois dismissed the complaint, 293 F.Supp. 411, and appeal was taken. The Supreme Court, Mr. Justice Douglas, held that Illinois statute which required that petition to nominate condidates for general election for new political party be signed by at least 25,000 qualified voters, including 200 qualified voters from each of at least 50 counties, violated due process and equal protection clauses of Fourteenth Amendment where the electorate in 49 of the counties which contained 93.4% of registered voters would be unable to form a new political party and place its candidates on the ballot while 25,000 of remaining 6.6% of registered voters properly distributed among 53 remaining counties might form a new party to elect candidates to office.

Reversed.

Mr. Justice Stewart and Mr. Justice Harlan dissented.

West Headnotes

[1] Federal Courts ⇐724
170Bk724 Most Cited Cases
(Formerly 30k781(4))
Where Illinois statute which requires that petition to nominate candidates for general election for new political party be signed by at least 25,000 qualified voters, including 200 qualified voters from each of at least 50 counties would control future elections as long as Illinois maintained her present system, problem of placing new political party on ballot was capable of repetition and Supreme Court would hear appeal from dismissal of candidates' declaratory judgment suit, even though 1968 election for which candidate sought relief was over. 28 U.S.C.A. § 1253; U.S.C.A.Const. Amend. 14.

[2] Declaratory Judgment ⇐124.1
118Ak124.1 Most Cited Cases
(Formerly 118Ak124)
When a state makes classifications of voters which favor residents of some counties over residents of other counties, a justiciable controversy under the equal protection clause is presented. U.S.C.A.Const. Amend. 14.

[3] Elections ⇐141
144k141 Most Cited Cases
Use of nominating petitions by independents to obtain place on Illinois ballot is integral part of Illinois elective system. S.H.A.Ill. ch. 46, §§ 7-14, 10-3.

[4] Elections ⇐11
144k11 Most Cited Cases
All procedures used by a state as integral part of the election process must pass muster against the charges of discrimination or of abridgement of right to vote. U.S.C.A.Const. Amend. 14.

[5] Constitutional Law ⇐225.3(12)
92k225.3(12) Most Cited Cases
(Formerly 92k225(1))
Where Illinois statute requiring that petition to nominate candidates for general election for new political party be signed by at least 25,000 voters, including 200 qualified voters from each of at least 50 counties, applied rigid, arbitrary formula to sparsely settled counties and populous counties alike, contrary to constitutional theme of equality among citizens in exercise of their political rights, equal protection clause was violated even though law was designed to require statewide support for launching a new political party rather than support from a few localities. S.H.A.Ill. ch. 46, § 10-3; U.S.C.A.Const. Amend. 14.

[6] Constitutional Law ⇐225.3(1)
92k225.3(1) Most Cited Cases

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(Formerly 92k225(1))
Idea that one group can be granted greater voting strength than another is hostile to the one man-one vote basis of our representative government. U.S.C.A.Const. Amend. 14.
[7] Constitutional Law ⇐225.3(12)
92k225.3(12) Most Cited Cases
(Formerly 92k225(1))
[7] Constitutional Law ⇐274.2(2)
92k274.2(2) Most Cited Cases
(Formerly 92k253(2), 92k253)
[7] Elections ⇐21
144k21 Most Cited Cases
Illinois statute which required that petition to nominate candidates for general election for new political party be signed by at least 25,000 qualified voters, including 200 qualified voters from each of at least 50 counties, violated due process and equal protection clauses of Fourteenth Amendment where the electorate in 49 of the counties which contained 93.4% of registered voters would be unable to form a new political party and place its candidates on the ballot while 25,000 of remaining 6.6% of registered voters properly distributed among 53 remaining counties might form a new party to elect candidates to office; overruling MacDougall v. Green, 335 U.S. 281, 69 S.Ct. 1. S.H.A.Ill. ch. 46, § 10-3; U.S.C.A.Const. Amend. 14.
****1494 *814** Richard F. Watt, Chicago, Ill., for appellants.

John J. O'Toole and Richard E. Friedman, Chicago, Ill., for appellees.

***815** Opinion of the Court by Mr. Justice DOUGLAS, announced by Mr. Justice BRENNAN.

This is a suit for declaratory relief and for an injunction, 28 U.S.C. ss 2201, 2202, brought by appellants who are independent candidates for the offices of electors of President and Vice President of the United States from Illinois. The defendants or appellees are members of the Illinois Electoral Board. Ill.Rev.Stat. c. 46, s 7--14. In 1968 appellants filed with appellees petitions containing the names of 26,500 qualified voters who desired that appellants be nominated. The appellees ruled that appellants could not be certified to the county clerks for the November 1968 election because of a proviso added in 1935 to an Illinois statute requiring that at least 25,000 electors sign a petition to nominate such candidates. The proviso reads:

> '* * * that included in the aggregate total of 25,000 signatures are the signatures of 200 qualified voters from each of at least 50 counties.' Ill.Rev.Stat., c. 46, s 10--3 (1967).

A three-judge District Court was convened, 28 U.S.C. ss 2281, 2284, which, feeling bound by MacDougall v. Green, 335 U.S. 281, 69 S.Ct. 1, 93 L.Ed. 3, dismissed the complaint for failure to state a cause of action. 293 F.Supp. 411. The case is here on appeal. 28 U.S.C. s 1253.

On October 8, 1968, the same day the case was docketed, appellants filed a motion to advance and expedite the hearing and disposition of this cause. Appellees opposed the motion. On October 14, 1968, we entered the following order:

> 'Because of the representation of the State of Illinois that 'It would be a physical impossibility' for the State 'to effectuate the relief which the appellants seek,' the 'Motion to Advance and Expedite the ***816** Hearing and Disposition of this Cause' is denied. Mr. Justice Fortas would grant the motion.' 393 U.S. 814, 89 S.Ct. 138, 21 L.Ed.2d 90.

[1] Appellees urged in a motion to dismiss that since the November 5, 1968, election has been held, there is no possibility of granting any relief to appellants and that the appeal should be dismissed. But while the 1968 election is over, the burden which MacDougall v. Green, supra, allowed to be placed on the nomination of candidates for statewide offices remains and controls future elections, as long as Illinois maintains her present system as she has done since 1935. The problem is therefore 'capable of repetition, yet evading review,' Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310. The need for its resolution thus reflects a continuing controversy in the federalstate area where our 'one man, one vote' decisions have thrust. We turn then to the merits.

****1495** MacDougall v. Green is indistinguishable from the present controversy. The allegations in that case were that 52% of the State's registered voters were residents of Cook County alone, 87% were residents of the 49 most populous counties, and only 13% resided in the 53 least populous

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counties. The argument was that a nominating procedure so weighted violates the Equal Protection Clause.

Today, in contrast, 93.4% of the State's registered voters reside in the 49 most populous counties, and only 6.6% are resident in the remaining 53 counties. The constitutional argument, however, remains the same.

Five members of the Court held in MacDougall that a State has 'the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting ***817** their political weight at the polls not available to the former.' 335 U.S., at 284, 69 S.Ct. at 3. Three members of the Court dissented on the ground that the nominating procedure violated the Equal Protection Clause. One member of the Court voted not to exercise this Court's jurisdiction in equity to resolve the dispute.

[2] While the majority cited Colegrove v. Green, 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432, as their authority for denying relief and while a few who took part in Colegrove put this type of question in the 'political' as distinguished from the 'justiciable' category, 328 U.S., at 552, 66 S.Ct. at 1199 that matter was authoritatively resolved in Baker v. Carr, 369 U.S. 186, 202, 82 S.Ct. 691, 702, 7 L.Ed.2d 663. When a State makes classifications of voters which favor residents of some counties over residents of other counties, a justiciable controversy is presented. 369 U.S., at 198--204, 82 S.Ct. at 699--703.

When we struck down the Georgia county-unit system in statewide primary elections, we said:

> 'How then can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote--whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment.' Gray v. Sanders, 372 U.S. 368, 379, 83 S.Ct. 801, 808, 9 L.Ed.2d 821.

Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506, held that a State in an apportionment of state representatives and senators among districts and counties could not deprive voters in ***818** the more populous counties of their proportionate share of representatives and senators.

> 'The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.' 377 U.S., at 555, 84 S.Ct., at 1378.

[3][4] We have said enough to indicate why MacDougall v. Green is out of line with our recent apportionment cases. The use of nominating petitions by independents to obtain a place on the Illinois ballot is an integral part of her elective system. See People ex rel. v. Board of Election Commissioners, 221 Ill. 9, 18, 77 N.W. 321, 323. All procedures ****1496** used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgment of the right to vote. United States v. Classic, 313 U.S. 299, 314--318, 61 S.Ct. 1031, 1037--1039, 85 L.Ed. 1368; Smith v. Allwright, 321 U.S. 649, 664, 64 S.Ct. 757, 765, 88 L.Ed. 897.

Dusch v. Davis, 387 U.S. 112, 87 S.Ct. 1554, 18 L.Ed.2d 656, is not relevant to the problem of this case. There each councilman was required to be a resident of the borough from which he was elected. Like the residence requirement for state senators from a multi-district county (Fortson v. Dorsey, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401), the place of residence did not mark the voting unit; for in Dusch all the electors in the city voted for each councilman.

[5][6] It is no answer to the argument under the Equal Protection Clause that this law was designed to require statewide support for launching a new political party rather than support from a few localities. This law applies a rigid, arbitrary

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formula to sparsely settled counties and populous counties alike, contrary to the constitutional ***819** theme of equality among citizens in the exercise of their political rights. The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government.

[7] Under this Illinois law the electorate in 49 of the counties which contain 93.4% of the registered voters may not form a new political party and place its candidates on the ballot. Yet 25,000 of the remaining 6.6% of registered voters properly distributed among the 53 remaining counties may form a new party to elect candidates to office. This law thus discriminates against the residents of the populous counties of the State in favor of rural sections. It, therefore, lacks the equality to which the exercise of political rights is entitled under the Fourteenth Amendment.

MacDougall v. Green is overruled.

Reversed.

Mr. Justice STEWART, with whom Mr. Justice HARLAN joins, dissenting.

I cannot join in the Court's casual extension of the 'one voter, one vote' slogan to a case that involves neither voters, votes, nor even an ongoing dispute.

First of all, the case is moot. The appellants brought this action merely as prospective 'candidates for the offices of Electors of President and Vice-President of the United States from the State of Illinois to be voted on at the general election to be held on November 5, 1968.' But the 1968 election is now history, and no relief relating to its outcome is sought. In the absence of any assertion that the appellants intent to participate as candidates in any future Illinois election, the Court's reference to cases involving 'continuing controversies' between the parties is wide of the mark. Cf. Golden v. Zwickler, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113. There simply remains no judicially cognizable dispute in this case. Since, however, the Court reaches a ***820** contrary conclusion, I shall indicate briefly the reasons for my disagreement with its holding on the merits.

The legislative apportionment cases, upon which the Court places its entire reliance, were decided on the theory that voters residing in 'underrepresented' electoral districts were denied equal protection.

> 'Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there.' Reynolds v. Sims, 377 U.S. 533, 563, 84 S.Ct. 1362, 1382, 12 L.Ed.2d 506.

In this case, by contrast, the appellants have sued merely as prospective candidates for office. They claim no impairment whatever of any interests they might have as voters; indeed, their complaint ****1497** contains no allegation that any of them is in fact a qualified Illinois voter. Undeterred by the appellants' failure to explain how or as against whom they themselves are denied equal protection, however, the Court reaches out to hold that this statute 'discriminates against the residents of the populous counties of the State in favor of rural sections.' But since no 'residents of the populous counties of the State' have asserted any rights, the Court's decision represents at best an advisory vindication of interests not involved in this case.

Even if the interests of voters in Illinois' 'populous counties' were actually represented here, the Court's conclusion would still be completely unjustified. Reynolds v. Sims, supra, and its offspring at least involved situations in which the 'debasement' or 'dilution' of voting power found by the Court was the 'certain' result of population variations among electoral districts. Under the Illinois statute now before us, however, no injury whatever is suffered by voters in heavily populated areas so long as their favored candidates are able to secure places on the ballot. And there is absolutely no indication in the record that the appellants could not, if they had made ***821** the effort, have easily satisfied Illinois' 50-county, 200- signature requirement. Indeed, there is no suggestion that the counties from which the appellants drew their support were 'populous' rather than 'rural.' The rationale of Reynolds v. Sims simply does not control this case.

Any reliance by the Court on Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24, would also be misplaced. That case involved an Ohio requirement that new political parties secure the support of over 433,000 persons--15% of the

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electorate--before their candidates could appear on the ballot. Here, the 25,000 signatures required by Illinois represent only about one-half of one percent of the total number of Illinois voters--a percentage requirement permissible, one would hope, under any view of the Rhodes case. Nor do the appellants make any showing that securing 200 signatures in less than half of the State's counties would be a burden at all comparable to that involved in Williams v. Rhodes.

The Court held in MacDougall v. Green, 335 U.S. 281, 69 S.Ct. 1, 93 L.Ed. 3 in sustaining the very statutory requirement here at issue, [FN1] that Illinois had pursued an 'allowable State policy (of) requir(ing) that candidates for statewide office should have support not limited to a concentrated locality.' Id., at 283, 69 S.Ct. at 2. That conclusion seems to me to be no less sound today than it was at the time of the MacDougall decision. [FN2] Illinois' policy is, in fact, not at ***822** all unlike that upheld by the Court only two Terms ago in Dusch v. Davis, 387 U.S. 112, 87 S.Ct. 1554, 18 L.Ed.2d 656, in which a district-residence requirement imposed upon municipal officers despite population variations among districts was nevertheless held proper as reasonably 'reflect(ing) a detente between urban and rural communities * * *.' Id., at 117, 87 S.Ct. at 1556. Cf. Lucas v. Forty-Fourth General Assembly, 377 U.S. 713, 744, 84 S.Ct. 1459, 1477, 12 L.Ed.2d 632 (Stewart, J., dissenting); Reynolds v. Sims, supra, at 589, 84 S.Ct. at 1395 (Harlan, J., dissenting).

> FN1. MacDougall involved Ill.Rev.Stat., c. 46, s 10--2, relating to ballot position for candidates of new political parties; Ill.Rev.Stat., c. 46, s 10--3, involved here, imposes identical signature requirements for independent candidates.

> FN2. While MacDougall involved candidates for various offices, the appellants here all sought election as presidential electors. See U.S.Const., Art. II, s 1:
> 'Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress * * *.' (Emphasis added.)

I respectfully dissent.

394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed.2d 1

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83 S.Ct. 328
371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405
(Cite as: 371 U.S. 415, 83 S.Ct. 328)

Supreme Court of the United States

NATIONAL ASSOCIATION FOR the ADVANCEMENT OF COLORED PEOPLE, etc., Petitioner,
v.
Robert Y. BUTTON, Attorney General of Virginia, et al.

No. 5.

Reargued Oct. 9, 1962.
Decided Jan. 14, 1963.

The National Association for the Advancement of Colored People brought suit against the Attorney General of Virginia and others for a declaration that certain Virginia statutes are unconstitutional. The Circuit Court for the City of Richmond entered a decree adverse to the NAACP, and it appealed. The Supreme Court of Appeals of Virginia, 202 Va. 142, 116 S.E.2d 55, affirmed the decree in part, and the NAACP brought certiorari. The United States Supreme Court, Mr. Justice Brennan, held that the activities of the NAACP, its affiliates, and legal staff are modes of expression and association which are protected by the First and Fourteenth Amendments, and which Virginia may not prohibit under its power to regulate the legal profession and improper solicitation of legal business, and that Virginia statute, construed by Virginia Supreme Court of Appeals, as proscribing any arrangement by which prospective litigants are advised to seek assistance of particular attorneys and making it a crime for a person to advise another that his legal rights have been infringed and to refer him to particular attorney or group of attorneys such as legal staff of Virginia conference of NAACP for assistance violates freedoms of First Amendment protected against state action by Fourteenth Amendment.

Reversed.

Mr. Justice White dissented in part; Mr. Justice Harlan, Mr. Justice Clark, and Mr. Justice Stewart dissented.

West Headnotes

[1] Federal Courts ⇐505
170Bk505 Most Cited Cases
United States Supreme Court granted certiorari to review holding that Virginia statute banning improper solicitation of any legal or professional business was applicable to NAACP and constitutional. Acts Ex.Sess. Va.1956, c. 33.

[2] Federal Courts ⇐503
170Bk503 Most Cited Cases
(Formerly 106k393)
Where party remitted to state courts by federal district court elects to seek complete and final adjudication of his rights in state courts, reservation by federal district court of jurisdiction is purely formal and does not impair jurisdiction of United States Supreme Court to review directly an otherwise final state court judgment.

[3] Federal Courts ⇐503
170Bk503 Most Cited Cases
(Formerly 106k393)
Where three-judge federal district court retained jurisdiction of suits while authoritative construction of Virginia statutes was sought in Virginia courts, but plaintiff in Virginia circuit court sought binding adjudication of all claims and permanent injunction and declaratory relief by making no reservation to disposition of entire case by state courts and by coming to United States Supreme Court directly on certiorari to review judgment of Virginia Supreme Court of Appeals, that judgment was final and case was properly before United States Supreme Court. 28 U.S.C.A. § 2281.

[4] Constitutional Law ⇐42.2(1)
92k42.2(1) Most Cited Cases
(Formerly 92k42)
NAACP, which is engaged in activities curtailed by Virginia statute proscribing any arrangement by which prospective litigants are advised to seek assistance of particular attorneys, though a corporation, may assert on its own behalf that statute abridges freedoms of First Amendment,

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protected against state action by Fourteenth Amendment, by infringing right of NAACP and its members and lawyers to associate to assist persons seeking legal redress for infringements of their constitutionally guaranteed and other rights, and NAACP also has standing to assert corresponding rights of its members. Acts Ex.Sess.Va.1956, c. 33; U.S.C.A. Const.Amends. 1, 14.

[5] Constitutional Law ⇦90.1(1.5)
92k90.1(1.5) Most Cited Cases
(Formerly 92k90.1(1), 92k90)

[5] Constitutional Law ⇦91
92k91 Most Cited Cases

Activities of NAACP, its affiliates, and legal staff are modes of expression and association which are protected by First and Fourteenth Amendments, and which Virginia may not prohibit under its power to regulate legal profession as improper solicitation of legal business in violation of Virginia statute and canons of professional ethics. Acts Ex.Sess. Va.1956, c. 33; U.S.C.A.Const. Amends. 1, 14.

[6] Constitutional Law ⇦82(3)
92k82(3) Most Cited Cases
(Formerly 92k82)

A state cannot foreclose exercise of constitutional rights under First Amendment by mere labels. U.S.C.A.Const. Amends. 1, 14.

[7] Constitutional Law ⇦90(2)
92k90(2) Most Cited Cases
(Formerly 92k90)

Abstract discussion is not only species of communication which First Amendment protects, it also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion.

[8] Constitutional Law ⇦82(3)
92k82(3) Most Cited Cases
(Formerly 92k82, 92k8, 92k2, 92k51)

[8] Constitutional Law ⇦225.1
92k225.1 Most Cited Cases
(Formerly 92k209)

[8] Constitutional Law ⇦251
92k251 Most Cited Cases

First and Fourteenth Amendments protect certain forms of orderly group activity. U.S.C.A.Const. Amends. 1, 14.

[9] Federal Courts ⇦386
170Bk386 Most Cited Cases

Construction of Virginia statute by Supreme Court of Appeals of Virginia was binding on United States Supreme Court, and words of Supreme Court of Appeals of Virginia were words of Virginia statute. Acts Ex.Sess. Va.1956, c. 33.

[10] Statutes ⇦47
361k47 Most Cited Cases

Standards of permissible statutory vagueness are strict in area of free expression guaranteed by First Amendment. U.S.C.A.Const. Amends. 1, 14.

[11] Constitutional Law ⇦82(6.1)
92k82(6.1) Most Cited Cases
(Formerly 92k82(6), 92k82)

Decree of Supreme Court of Appeals of Virginia declaring that Virginia statute proscribing any arrangement by which prospective litigants are advised to seek assistance of particular attorneys was applicable to NAACP would be invalid if it prohibited privileged exercises of First Amendment rights whether or not record disclosed that NAACP engaged in privileged conduct, for in appraising statute's inhibitory effect on such rights United States Supreme Court will not hesitate to take into account possible applications of statute in other factual contexts besides that in suit by NAACP. Acts Ex.Sess. Va.1956, c. 33; U.S.C.A.Const. Amends. 1, 14.

[12] Constitutional Law ⇦82(3)
92k82(3) Most Cited Cases
(Formerly 92k82)

Government may regulate in area of First Amendment freedoms only with narrow specificity. U.S.C.A.Const. Amends. 1, 14.

[13] Attorney and Client ⇦32(9)
45k32(9) Most Cited Cases
(Formerly 45k32)

[13] Champerty and Maintenance ⇦3
74k3 Most Cited Cases

[13] Constitutional Law ⇦274(2)
92k274(2) Most Cited Cases
(Formerly 92k274)

Virginia statute, construed by Virginia Supreme Court of Appeals, as proscribing any arrangement by which prospective litigants are advised to seek assistance of particular attorneys and making it crime for person to advise another that his legal rights have been infringed and to refer him to particular attorney or group of attorneys such as legal staff of Virginia conference of NAACP for assistance violates freedoms of First Amendment protected against state action by Fourteenth Amendment. Acts Ex.Sess. Va. 1956, c. 33; U.S.C.A.Const. Amends. 1, 14.

[14] Constitutional Law ⇦82(3)
92k82(3) Most Cited Cases

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(Formerly 92k82)
Only compelling state interest in regulation of subject within state's constitutional power to regulate can justify limiting First Amendment freedoms. U.S.C.A.Const. Amends. 1, 14.

[15] Constitutional Law ⇐82(3)
92k82(3) Most Cited Cases
(Formerly 92k82)
State may not, under guise of prohibiting professional misconduct by attorneys, ignore constitutional rights under First Amendment. U.S.C.A.Const. Amend. 1.

[16] Constitutional Law ⇐82(3)
92k82(3) Most Cited Cases
(Formerly 92k82)
Interest of Virginia in regulating traditionally illegal practices of barratry, maintenance, and champerty does not justify prohibition of activities of NAACP. U.S.C.A.Const. Amend. 1.

[17] Constitutional Law ⇐90(2)
92k90(2) Most Cited Cases
(Formerly 92k90)

[17] Constitutional Law ⇐91
92k91 Most Cited Cases
First Amendment protects expression and association without regard to race, creed, or political or religious affiliation of members of group which invokes its shield, or to truth, popularity, or social utility of ideas and beliefs which are offered. U.S.C.A.Const. Amends. 1, 14.

****330 *417** Robert L. Carter, New York City, for petitioner.

Henry T. Wickham, Richmond, Va., for respondents.

Mr. Justice BRENNAN delivered the opinion of the Court.

[1] This case originated in companion suits by the National Association for the Advancement of Colored People, Inc. (NAACP), and the NAACP Legal Defense and Education Fund, Inc. (Defense Fund), brought in 1957 in the United States District Court for the Eastern District of Virginia. The suits sought to restrain the enforcement of Chapters 31, 32, 33, 35 and 36 of the Virginia Acts of Assembly, 1956 Extra Session, on the ground that the ***418** statutes, as applied to the activities of the plaintiffs, violated the Fourteenth Amendment. A three-judge court convened pursuant to 28 U.S.C. s 2281, 28 U.S.C.A. s 2281, after hearing evidence and making fact-findings, struck down Chapters 31, 32 and 35 but abstained from passing upon the validity of Chapters 33 and 36 pending an authoritative interpretation of these statutes by the Virginia courts. [FN1] The complainants thereupon petitioned in the Circuit Court of the City of Richmond to declare Chapters 33 and 36 inapplicable to their activities, or, if applicable, unconstitutional. The record in the Circuit Court was that made before the three-judge court supplemented by additional evidence. The Circuit Court held the chapters to be both applicable and constitutional. The holding was sustained by the Virginia Supreme Court of Appeals as to Chapter 33, but reversed as to Chapter 36, which was held unconstitutional under both state and federal law. [FN2] Thereupon the Defense Fund returned to the Federal District Court, where its case is presently pending, while the NAACP filed the instant petition. We granted certiorari. 365 U.S. 842, 81 S.Ct. 803, 5 L.Ed.2d 807. [FN3] We heard argument in the 1961 Term ***419** and ordered reargument this Term. 369 U.S. 833, 82 S.Ct. 863, 7 L.Ed.2d 841. Since no cross-petition was filed to review the Supreme Court of Appeals' disposition of Chapter 36, the only issue before us is the constitutionality of Chapter 33 as applied to the activities of the NAACP.

FN1. NAACP v. Patty, 159 F.Supp. 503 (D.C.E.D.Va.1958). On direct appeal under 28 U.S.C. s 1253, 28 U.S.C.A. s 1253, from the judgment striking down Chapters 31, 32 and 35, this Court reversed, remanding with instructions to permit the complainants to seek an authoritative interpretation of the statutes in the Virginia courts. Harrison v. NAACP, 360 U.S. 167, 79 S.Ct. 1025, 3 L.Ed.2d 1152. In ensuing litigation, the Circuit Court of the City of Richmond held most of the provisions of the three chapters unconstitutional. NAACP v. Harrison, Chancery causes No. B--2879 and No. B--2880, Aug. 31, 1962.

FN2. NAACP v. Harrison, 202 Va. 142, 116 S.E.2d 55 (1960). Chapter 36, which is codified in s 18.1--394 et seq., Code of Virginia (1960 Repl. Vol.), prohibits the

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> advocacy of suits against the Commonwealth and the giving of any assistance, financial or otherwise, to such suits.
>
> FN3. Certiorari was first granted, sub nom. NAACP v. Gray, 83 S.Ct. 181. The litigation began sub nom. NAACP v. Patty, Attorney General of Virginia. During the course of the litigation the names of successive holders of that office have been substituted as party respondent. See Supreme Court Rule 48, par. 3, as amended, 28 U.S.C.A. 366 U.S. 979.

There is no substantial dispute as to the facts; the dispute centers about the constitutionality under the Fourteenth Amendment of Chapter 33, as construed and applied by the Virginia Supreme Court of Appeals to include NAACP's activities within the statute's ban against****331** 'the improper solicitation of any legal or professional business.'

The NAACP was formed in 1909 and incorporated under New York law as a nonprofit membership corporation in 1911. It maintains its headquarters in New York and presently has some 1,000 active unincorporated branches throughout the Nation. The corporation is licensed to do business in Virginia, and has 89 branches there. The Virginia branches are organized into the Virginia State Conference of NAACP Branches (the Conference), an unincorporated association, which in 1957 had some 13,500 members. The activities of the Conference are financed jointly by the national organization and the local branches from contributions and membership dues. NAACP policy, binding upon local branches and conferences, is set by the annual national convention.

The basic aims and purposes of NAACP are to secure the elimination of all racial barriers which deprive Negro citizens of the privileges and burdens of equal citizenship rights in the United States. To this end the Association engages in extensive educational and lobbying activities. It also devotes much of its funds and energies to an extensive ***420** program of assisting certain kinds of litigation on behalf of its declared purposes. For more than 10 years, the Virginia Conference has concentrated upon financing litigation aimed at ending racial segregation in the public schools of the Commonwealth.

The Conference ordinarily will finance only cases in which the assisted litigant retains an NAACP staff lawyer to represent him. [FN4] The Conference maintains a legal staff of 15 attorneys, all of whom are Negroes and members of the NAACP. The staff is elected at the Conference's annual convention. Each legal staff member must agree to abide by the policies of the NAACP, which, insofar as they pertain to professional services, limit the kinds of litigation which the NAACP will assist. Thus the NAACP will not underwrite ordinary damages actions, criminal actions in which the defendant raises no question of possible racial discrimination, or suits in which the plaintiff seeks separate but equal rather than fully desegregated public school facilities. The staff decides whether a litigant, who may or may not be an NAACP member, is entitled to NAACP assistance. The Conference defrays all expenses of litigation in an assisted case, and usually, although not always, pays each lawyer on the case a per diem fee not to exceed $60, plus out-of-pocket expenses. The assisted litigant receives no money from the Conference or the staff lawyers. The staff member may not accept, from the litigant or any other source, any other compensation for his services in an NAACP-assisted case. None of the staff receives a salary or retainer from the NAACP; the per diem fee is paid only for professional services in a particular case. This per diem payment is ***421** smaller than the compensation ordinarily received for equivalent private professional work. The actual conduct of assisted litigation is under the control of the attorney, although the NAACP continues to be concerned that the outcome of the lawsuit should be consistent with NAACP's policies already described. A client is free at any time to withdraw from an action.

> FN4. However, the record contains two instances where Negro litigants had retained attorneys, not on the legal staff, prior to seeking financial assistance from the Conference. The Conference rendered substantial financial assistance in both cases. In one case the Conference paid the attorney's fee.

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The members of the legal staff of the Virginia Conference and other NAACP or Defense Fund lawyers called in by the staff to assist are drawn into litigation in various ways. One is for an aggrieved Negro to apply directly to the Conference or the legal staff for assistance. His application is referred to the Chairman of the legal staff. The Chairman, with ****332** the concurrence of the President of the Conference, is authorized to agree to give legal assistance in an appropriate case. In litigation involving public school segregation, the procedure tends to be different. Typically, a local NAACP branch will invite a member of the legal staff to explain to a meeting of parents and children the legal steps necessary to achieve desegregation. The staff member will bring printed forms to the meeting authorizing him, and other NAACP or Defense Fund attorneys of his designation, to represent the signers in legal proceedings to achieve desegregation. On occasion, blank forms have been signed by litigants, upon the understanding that a member or members of the legal staff, with or without assistance from other NAACP lawyers, or from the Defense Fund, would handle the case. It is usual, after obtaining authorizations, for the staff lawyer to bring into the case the other staff members in the area where suit is to be brought, and sometimes to bring in lawyers from the national organization or the Defense Fund. [FN5] In effect, then, the prospective ***422** litigant retains not so much a particular attorney as the 'firm' of NAACP and Defense Fund lawyers, which has a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation.

> FN5. The Defense Fund, which is not involved in the present phase of the litigation, is a companion body to the NAACP. It is also a nonprofit New York corporation licensed to do business in Virginia, and has the same general purposes and policies as the NAACP. The Fund maintains a legal staff in New York City and retains regional counsel elsewhere, one of whom is in Virginia. Social scientists, law professors and law students throughout the country donate their services to the Fund without compensation. When requested by the NAACP, the Defense Fund provides assistance in the form of legal research and counsel.

These meetings are sometimes prompted by letters and bulletins from the Conference urging active steps to fight segregation. The Conference has on occasion distributed to the local branches petitions for desegregation to be signed by parents and filed with local school boards, and advised branch officials to obtain, as petitioners, persons willing to 'go all the way' in any possible litigation that may ensue. While the Conference in these ways encourages the bringing of lawsuits, the plaintiffs in particular actions, so far as appears, make their own decisions to become such. [FN6]

> FN6. Seven persons who were or had been plaintiffs in Virginia public school suits did testify that they were unaware of their status as plaintiffs and ignorant of the nature and purpose of the suits to which they were parties. It does not appear, however, that the NAACP had been responsible for their involvement in litigation. These plaintiffs testified that they had attended meetings of parents without grasping the meaning of the discussions, had signed authorizations either without reading or without understanding them, and thereafter had paid no heed to the frequent meetings of parents called to keep them abreast of legal developments. They also testified that they were not accustomed to read newspapers or listen to the radio. Thus they seem to have had little grasp of what was going on in the communities. Two of these seven plaintiffs had been persuaded to sign authorizations by their own children, who had picked up forms at NAACP meetings. Five were plaintiffs in the Prince Edward County school litigation, in which 186 persons were joined as plaintiffs. See NAACP v. Patty, 159 F.Supp. 503, 517 (D.C.E.D.Va.1958).

***423** Statutory regulation of unethical and nonprofessional conduct by attorneys has been in force in Virginia since 1849. These provisions outlaw, inter alia, solicitation of legal business in the form of 'running' or 'capping.' Prior to 1956,

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however, no attempt was made to proscribe under such regulations the activities of the NAACP, which had been carried on openly for many years in substantially the manner described. In 1956, however, the legislature amended, by the addition of Chapter 33, the provisions of the Virginia Code forbidding solicitation of legal business by a 'runner' or 'capper' ****333** to include, in the definition of 'runner' or 'capper,' an agent for an individual or organization which retains a lawyer in connection with an action to which it is not a party and in which it has no pecuniary right or liability. [FN7] ****334 *424** The Virginia Supreme Court of Appeals held that the chapter's purpose 'was to strengthen the existing statutes to further control the evils of solicitation of legal business * * *.' 202 Va., at 154, 116 S.E.2d, at 65. The ***425** court held that the activities of NAACP, the Virginia Conference, the Defense Fund, and the lawyers furnished by them, fell within, and could constitutionally be proscribed by, the chapter's expanded definition of improper solicitation of legal business, and also violated Canons 35 and 47 of the American Bar Association's Canons of Professional Ethics, which the court had ***426** adopted in 1938. [FN8] Specifically the court held that, under the expanded definition, such activities on the part of NAACP, the Virginia Conference, and the Defense Fund constituted 'fomenting and soliciting legal business in which they are not parties and have no pecuniary right or liability, and which they channel to the enrichment of certain lawyers employed by them, at no cost to the litigants and over which the litigants have no control.' 202 Va., at 155, 116 S.E.2d, at 66. Finally, the court restated the decree of the Richmond Circuit Court. We have excerpted the pertinent portion of the court's holding in the margin. [FN9]

FN7. Code of Virginia, 1950, ss 54--74, 54--78, and 54--79, as amended by Acts of 1956, Ex.Sess., c. 33 (Repl. Vol. 1958), read in pertinent part as follows (amendments in italics):

's 54--74. * * * If the Supreme Court of Appeals, or any court of record of this State, observes, or if complaint, verified by affidavit, be made by any person to such court of any malpractice or of any unlawful or dishonest or unworthy or corrupt or unprofessional conduct on the part of any attorney, or that any person practicing law is not duly licensed to practice in this State, such court shall, if it deems the case a proper one for such action, issue a rule against such attorney or other person to show cause why his license to practice law shall not be revoked or suspended.

'Upon the hearing, if the defendant be found guilty by the court, his license to practice law in this State shall be revoked, or suspended for such time as the court may prescribe; provided, that the court, in lieu of revocation or suspension, may, in its discretion, reprimand such attorney.

"Any malpractice, or any unlawful or dishonest or unworthy or corrupt or unprofessional conduct', as used in this section, shall be construed to include the improper solicitation of any legal or professional business or employment, either directly or indirectly, or the acceptance of employment, retainer, compensation or costs from any person, partnership, corporation, organization or association with knowledge that such person, partnership, corporation, organization or association has violated any provision of article 7 of this chapter (ss 54--78 to 54--83.1), or the failure, without sufficient cause, within a reasonable time after demand, of any attorney at law, to pay over and deliver to the person entitled thereto, any money, security or other property, which has come into his hands as such attorney; provided, however, that nothing contained in this article shall be construed to in any way prohibit any attorney from accepting employment to defend any person, partnership, corporation, organization or association accused of violating the provisions of article 7 of this chapter.

's 54--78. * * * (1) A 'runner' or 'capper' is any person, corporation, partnership or association acting in any manner or in any capacity as an agent for an attorney at law within this State or for any person, partnership, corporation, organization or association which employs, retains or compensates any attorney at law in connection with any judicial proceeding in

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which such person, partnership, corporation, organization or association is not a party and in which it has no pecuniary right or liability, in the solicitation or procurement of business for such attorney at law * * * or for such person, partnership, corporation, organization or association in connection with any judicial proceedings for which such attorney or such person, partnership, corporation, organization or association is employed, retained or compensated.

'The fact that any person, partnership, corporation, organization or association is a party to any judicial proceeding shall not authorize any runner or capper to solicit or procure business for such person, partnership corporation, organization or association or any attorney at law employed, retained or compensated by such person, partnership, corporation, organization or association.

'(2) An 'agent' is one who represents another in dealing with a third person or persons.

's 54--79. * * * It shall be unlawful for any person, corporation, partnership or association to act as a runner or capper * * * as defined in s 54--78 to solicit any business for * * * an attorney at law or such person, partnership, corporation, organization or association, in and about the State prisons, county jails, city jails, city prisons, or other places of detention of persons, city receiving hospitals, city and county receiving hospitals, county hospitals, police courts, * * * county courts, municipal courts, * * * courts of record, or in any public institution or in any public place or upon any public street or highway or in and about private hospitals, sanitariums, or in and about any private institution or upon private property of any character whatsoever.' Code of Virginia, 1950, ss 54--82, 54--83.1, as amended (Repl. Vol. 1958), provide:

's 54.82. Penalty for violation.--Any person, corporation, partnership or association violating any of the provisions of this article shall be guilty of a misdemeanor, and shall be punishable by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment for not less than one month nor more than six months, or by both such fine and imprisonment. * * *

's 54--83.1. Injunction against running, capping, soliciting and maintenance.--The Commonwealth's attorney, or any person, firm or corporation against whom any claim for damage to property or damages for personal injuries or for death resulting therefrom, is or has been asserted, may maintain a suit in equity against any person who has solicited employment for himself or has induced another to solicit or encourage his employment, or against any person, firm, partnership or association which has acted for another in the capacity of a runner or capper or which has been stirring up litigation in such a way as to constitute maintenance whether such solicitation was successful or not, to enjoin and permanently restrain such person, his agents, representatives and principals from soliciting any such claims against any person, firm or corporation subsequent to the date of the injunction.'

FN8. 171 Val., pp. xxxii--xxxiii, xxxv (1938). Canon 35 reads in part as follows: 'Intermediaries.--The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes, between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. Charitable societies rendering aid to the indigent are not deemed such intermediaries.' Canon 47 reads as follows: 'Aiding the Unauthorized Practice of Law.--No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate.'

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FN9. '(T)he solicitation of legal business by the appellants, their officers, members, affiliates, voluntary workers and attorneys, as shown by the evidence, violates chapter 33 and the canons of legal ethics;
'* * * attorneys who accept employment by appellants to represent litigants in suits solicited by the appellants, or those associated with them, are violating chapter 33 and the canons of legal ethics;
'* * * appellants and those associated with them may not be prohibited from acquainting persons with what they believe to be their legal rights and advising them to assert their rights by commencing or further prosecuting a suit against the Commonwealth of Virginia, any department, agency or political subdivision thereof, or any person acting as an officer or employee of such but in so advising persons to commence or further prosecute such suits the appellants, or those associated with them, shall not solicit legal business for their attorneys or any particular attorneys; and
'(b) the appellants and those associated with them may not be prohibited from contributing money to persons to assist them in commencing or further prosecuting such suits, which have not been solicited by the appellants or those associated with them, and channeled by them to their attorneys or any other attorneys.' 202 Va., at 164--165, 116 S.E.2d, at 72.

****335 *427** I.

[2][3] A jurisdictional question must first be resolved: whether the judgment below was 'final' within the meaning of 28 U.S.C. s 1257, 28 U.S.C.A. s 1257. The three-judge Federal District Court retained jurisdiction of this case while an authoritative construction of Chapters 33 and 36 was being sought in the Virginia courts. Cf. Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168, 173, 62 S.Ct. 986, 988, 86 L.Ed. 1355. The question of our jurisdiction arises because, when the case was last here, we observed that such abstention to secure state court interpretation 'does not, of course, involve the abdication (by the District Court) of federal jurisdiction, but only the postponement of its exercise * * *.' Harrison v. NAACP, 360 U.S. 167, 177, 79 S.Ct. 1025, 1030, 3 L.Ed.2d 1152. We meant simply that the District Court had properly retained jurisdiction, since a party has the right to return to the District Court, after obtaining the authoritative state court construction for which the court abstained, for a final determination of his claim. Where, however, the party remitted to the state courts elects to seek a complete and final adjudication of his rights in the state courts, the District Court's reservation of jurisdiction is purely formal, and does not impair our jurisdiction to review directly an otherwise final state court judgment. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072. We think it clear that petitioner made such an ***428** election in the instant case, by seeking from the Richmond Circuit Court 'a binding adjudication' of all its claims and a permanent injunction as well as declaratory relief, by making no reservation to the disposition of the entire case by the state courts, and by coming here directly on certiorari. Therefore, the judgment of the Virginia Supreme Court of Appeals was final, and the case is properly before us.

II.

[4] Petitioner challenges the decision of the Supreme Court of Appeals on many grounds. But we reach only one: that Chapter 33 as construed and applied abridges the freedoms of the First Amendment, protected against state action by the Fourteenth. [FN10] More specifically, petitioner claims that the chapter infringes the right of the NAACP and its members and lawyers to associate for the purpose of assisting persons who seek legal redress for infringements of their constitutionally guaranteed and other rights. We think petitioner may assert this right on its own behalf, because, though a corporation, it is directly engaged in those activities, claimed to be constitutionally protected, which the statute would curtail. Cf. Grosjean v. American Press Co., 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660. We also think petitioner has standing to assert the corresponding rights of its members. See NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 458--460, 78 S.Ct. 1163, 1169, 2 L.Ed.2d 1488; Bates v. City of Little Rock, 361 U.S. 516, 523, n. 9, 80 S.Ct. 412, 416, 4 L.Ed.2d 480; Louisiana ex rel. Gremillion v. NAACP, 366 U.S.

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293, 296, 81 S.Ct. 1333, 1335, 6 L.Ed.2d 301.

FN10. Petitioner also claims that Chapter 33 as construed denies equal protection of the laws, and is so arbitrary and irrational as to deprive petitioner of property without due process of law.

[5] We reverse the judgment of the Virginia Supreme Court of Appeals. We hold that the activities of the NAACP, its affiliates and legal staff shown on this record are modes of expression and association protected by the First and ***429** Fourteenth Amendments which Virginia may not prohibit, under its power to regulate the legal profession, as improper solicitation of legal businessviolative ****336** of Chapter 33 and the Canons of Professional Ethics. [FN11]

FN11. It is unclear--and immaterial--whether the Virginia court's opinion is to be read as holding that NAACP's activities violated the Canons because they violated Chapter 33, or as reinforcing its holding that Chapter 33 was violated by finding an independent violation of the Canons. Our holding that petitioner's activities are constitutionally protected applies equally whatever the source of Virginia's attempted prohibition.

A.

[6][7] We meet at the outset the contention that 'solicitation' is wholly outside the area of freedoms protected by the First Amendment. To this contention there are two answers. The first is that a State cannot foreclose the exercise of constitutional rights by mere labels. The second is that abstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion. Thomas v. Collins, 323 U.S. 516, 537, 65 S.Ct. 315, 325, 89 L.Ed. 430; Herndon v. Lowry, 301 U.S. 242, 259--264, 57 S.Ct. 732, 739--742, 81 L.Ed. 1066. Cf. Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213; Stromberg v. California, 283 U.S. 359, 369, 51 S.Ct. 532, 535, 75 L.Ed. 1117; Terminiello v. Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 895, 93 L.Ed. 1131. In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. [FN12] Just as it was true of the ***430** opponents of New Deal legislation during the 1930's, [FN13] for example, no less is it true of the Negro minority today. And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.

FN12. Murphy, The South Counterattacks: The Anti-NAACP Laws, 12 W.Pol.Q. 371 (1959). See Bentley, The Process of Government: A Study of Social Pressures (1908); Rosenblum, Law as a Political Instrument (1955); Peltason, Federal Courts in the Political Process (1955); Truman, The Governmental Process: Political Interests and Public Opinion (1955); Vose, The National Consumers' League and the Brandeis Brief, 1 Midw.J. of Pol.Sci. 267 (1957); Comment, Private Attorneys-General: Group Action in the Fight for Civil Liberties, 58 Yale L.J. 574 (1949).

FN13. Cf. Opinion 148, Committee on Professional Ethics and Grievances, American Bar Association (1935), ruling that the Liberty League's program of assisting litigation challenging New Deal legislation did not constitute unprofessional conduct.

[8] We need not, in order to find constitutional protection for the kind of cooperative, organizational activity disclosed by this record, whereby Negroes seek through lawful means to achieve legitimate political ends, subsume such activity under a narrow, literal conception of freedom of speech, petition or assembly. For there is no longer any doubt that the First and Fourteenth Amendments protect certain forms of orderly group activity. Thus we have affirmed the right 'to engage

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in association for the advancement of beliefs and ideas.' NAACP v. Alabama, ex rel. Patterson, supra, 357 U.S. at 460, 78 S.Ct. at 1170. We have deemed privileged, under certain circumstances, the efforts of a union official to organize workers. Thomas v. Collins, supra. We have said that the Sherman Act does not apply to certain concerted activities of railroads 'at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws' because 'such a construction of the Sherman Act would raise important constitutional questions,' specifically, First Amendment questions. ****337*431**Eastern R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 138, 81 S.Ct. 523, 530, 5 L.Ed.2d 464. And we have refused to countenance compelled disclosure of a person's political associations in language closely applicable to the instant case:

> 'Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups * * *.' Sweezy v. New Hampshire, 354 U.S. 234, 250--251, 77 S.Ct. 1203, 1212, 1 L.Ed.2d 1311 (plurality opinion). Cf. De Jonge v. Oregon, 299 U.S. 353, 364--366, 57 S.Ct. 255, 260, 81 L.Ed. 278.

The NAACP is not a conventional political party; but the litigation it assists, while serving to vindicate the legal rights of members of the American Negro community, at the same time and perhaps more importantly, makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society. For such a group, association for litigation may be the most effective form of political association.

B.

[9] Our concern is with the impact of enforcement of Chapter 33 upon First Amendment freedoms. We start, of course, from the decree of the Supreme Court of Appeals. Although the action before it was one basically for declaratory relief, that court not only expounded the purpose and reach of the chapter but held concretely that certain of petitioner's activities had, and certain others had not, ***432** violated the chapter. These activities had been explored in detail at the trial and were spread out plainly on the record. We have no doubt that the opinion of the Supreme Court of Appeals in the instant case was intended as a full and authoritative construction of Chapter 33 as applied in a detailed factual context. That construction binds us. For us, the words of Virginia's highest court are the words of the statute. Hebert v. Louisiana, 272 U.S. 312, 317, 47 S.Ct. 103, 104, 71 L.Ed. 270. We are not left to speculate at large upon the possible implications of bare statutory language.

[10][11][12] But it does not follow that this Court now has only a clear-cut task to decide whether the activities of the petitioner deemed unlawful by the Supreme Court of Appeals are constitutionally privileged. If the line drawn by the decree between the permitted and prohibited activities of the NAACP, its members and lawyers is an ambiguous one, we will not presume that the statute curtails constitutionally protected activity as little as possible. For standards of permissible statutory vagueness are strict in the area of free expression. See Smith v. California, 361 U.S. 147, 151, 80 S.Ct. 215, 217, 4 L.Ed.2d 205; Winters v. New York, 333 U.S. 507, 509--510, 517--518, 68 S.Ct. 665, 667, 671, 92 L.Ed. 840; Herndon v. Lowry, 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066; Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117; United States v. C.I.O., 335 U.S. 106, 142, 68 S.Ct. 1349, 1367, 92 L.Ed. 1849 (Rutledge, J., concurring). Furthermore, the instant decree may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record discloses that the petitioner has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications ****338** of the statute in other factual contexts besides that at bar. Thornhill v. Alabama, 310 U.S. 88, 97--98, 60 S.Ct. 736, 741--742, 84 L.Ed. 1093; Winters v. New York, supra, 333 U.S. at 518--520,

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68 S.Ct. at 671--672. Cf. Staub v. City of Baxley, 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302. It makes no difference that the instant case was not a criminal prosecution and not based on a refusal to comply with a licensing requirement. The ***433** objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. [FN14] Cf. Marcus v. Search Warrant, 367 U.S. 717, 733, 81 S.Ct. 1708, 1717, 6 L.Ed.2d 1127. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Cf. Smith v. California, supra, 361 U.S. at 151--154, 80 S.Ct. at 217--219; Speiser v. Randall, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. Cantwell v. Connecticut, 310 U.S. 296, 311, 60 S.Ct. 900, 906, 84 L.Ed. 1213

FN14. Amsterdam, Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. of Pa.L.Rev. 67, 75--76, 80--81, 96--104 (1960).

We read the decree of the Virginia Supreme Court of Appeals in the instant case as proscribing any arrangement by which prospective litigants are advised to seek the assistance of particular attorneys. No narrower reading is plausible. We cannot accept the reading suggested on behalf of the Attorney General of Virginia on the second oral argument that the Supreme Court of Appeals construed Chapter 33 as proscribing control only of the actual litigation by the NAACP after it is instituted. In the first place, upon a record devoid of any evidence of interference by the NAACP in the actual conduct of litigation, or neglect or harassment of clients, the court nevertheless held that petitioner, its members, agents and staff attorneys had practiced criminal solicitation. Thus, simple referral to or recommendation of a lawyer may be solicitation within the meaning of Chapter 33. In the second place, the decree does not seem to rest on the fact ***434** that the attorneys were organized as a staff and paid by petitioner. The decree expressly forbids solicitation on behalf of 'any particular attorneys' in addition to attorneys retained or compensated by the NAACP. In the third place, although Chapter 33 purports to prohibit only solicitation by attorneys or their 'agents,' it defines agent broadly as anyone who 'represents' another in his dealings with a third person. Since the statute appears to depart from the common-law concept of the agency relationship and since the Virginia court did not clarify the statutory definition, we cannot say that it will not be applied with the broad sweep which the statutory language imports.

We conclude that under Chapter 33, as authoritatively construed by the Supreme Court of Appeals, a person who advises another that his legal rights have been infringed and refers him to a particular attorney or group of attorneys (for example, to the Virginia Conference's legal staff) for assistance has committed a crime, as has the attorney who knowingly renders assistance under such circumstances. There thus inheres in the statute the gravest danger of smothering all discussion looking to the eventual institution of litigation on behalf of the rights of members of an unpopular minority. Lawyers on the legal staff or even mere NAACP members or sympathizers would understandably hesitate, at an NAACP meeting or on any ****339** other occasion, to do what the decree purports to allow, namely, acquaint 'persons with what they believe to be their legal rights and * * * (advise) them to assert their rights by commencing or further prosecuting a suit * * *.' For if the lawyers, members of sympathizers also appeared in or had any connection with any litigation supported with NAACP funds contributed under the provision of the decree by which the NAACP is not prohibited 'from contributing money to persons to assist them in commencing or further prosecuting such ***435** suits,' they plainly would risk (if lawyers disbarment proceedings and, lawyers and nonlawyers alike, criminal prosecution for the offense of 'solicitation,' to which the Virginia court gave so broad and uncertain a meaning. It makes no difference whether such prosecutions or proceedings would actually be commenced. It is enough that a vague and broad statute lends itself to selective enforcement against unpopular causes.

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We cannot close our eyes to the fact that the militant Negro civil rights movement has engendered the intense resentment and opposition of the politically dominant white community of Virginia; [FN15] litigation assisted by the NAACP has been bitterly fought. [FN16] In such circumstances, ****340** a statute ***436** broadly curtailing group activity leading to litigation may easily become a weapon of oppression, however evenhanded its terms appear. Its mere existence could well freeze out of existence all such activity on behalf of the civil rights of Negro citizens.

FN15. See NAACP v. Patty, 159 F.Supp. 503, 516--517 (D.C.E.D.Va.1958); Davis v. County School Board, 149 F.Supp. 431, 438-- 439 (D.C.E.D.Va.1957), rev'd on other grounds sub nom. Allen v. County School Board, 249 F.2d 462 (C.A.4th Cir.) ; Muse, Virginia's Massive Resistance (1961), passim.

FN16. See, e.g., County School Bd. of Arlington County v. Thompson, 240 F.2d 59, 64 (C.A.4th Cir., 1956) (conduct of defendant termed a 'clear manifestation of an attitude of intransigence * * *'); James v. Duckworth, 170 F.Supp. 342, 350 (D.C.E.D.Va.1959), aff'd, 267 F.2d 224 (C.A.4th Cir.); Allen v. County School Bd., 266 F.2d 507 (C.A.4th Cir., 1959); Allen v. County School Bd., 198 F.Supp. 497, 502 (D.C.E.D.Va.1961). Most NAACP-assisted litigation in Virginia in recent years has been litigation challenging public school segregation. The sheer mass of such (and related) litigation is an indication of the intensity of the struggle: ALEXANDRIA: Jones v. School Bd., 179 F.Supp. 280 (D.C.E.D.Va.1959); Jones v. School Bd., 278 F.2d 72 (C.A.4th Cir., 1960); ARLINGTON: County School Bd. v. Thompson, 240 F.2d 59 (C.A.4th Cir., 1956); Thompson v. County School Bd., 144 F.Supp. 239 (D.C.E.D.Va.1956); 159 F.Supp. 567 (D.C.E.D.Va.1957); 166 F.Supp. 529 (D.C.E.D.Va.1958); 252 F.2d 929 (C.A.4th Cir., 1958); 2 Race Rel. 810 (D.C.E.D.Va.1957); 4 Race Rel. 609 (D.C.E.D.Va.1959); 4 Race Rel. 880 (D.C.E.D.Va.1959); Hamm v. School Bd. of Arlington County, 263 F.2d 226 (C.A.4th Cir., 1959); 264 F.2d 945 (C.A.4th Cir., 1959), CHARLOTTESVILLE: School Bd. of City of Charlottesville v. Allen, 240 F.2d 59 (C.A.4th Cir., 1956); Allen v. County School Bd., 1 Race Rel. 886 (D.C.W.D.Va.1956); 2 Race Rel. 986 (D.C.W.D.Va.1957); 3 Race Rel. 937 (D.C.W.D.Va.1958); 4 Race Rel. 881 (D.C.W.D.Va.1959); 263 F.2d 295 (C.A.4th Cir., 1959); 203 F.Supp. 225 (D.C.W.D.Va.1961); Dodson v. School Bd., 289 F.2d 439 (C.A.4th Cir., 1961); Dillard v. School Bd., 308 F.2d 920 (C.A.4th Cir., 1962). FAIRFAX COUNTY: Blackwell v. Fairfax County School Bd., 5 Race Rel. 1056 (D.C.E.D.Va.1960). FLOYD COUNTY: Walker v. Floyd County School Bd., 5 Race Rel. 1060 (D.C.W.D.Va.1960); 5 Race Rel. 714 (D.C.W.D.Va.1960). GRAYSON COUNTY: Goins v. County School Bd., 186 F.Supp. 753 (D.C.W.D.Va.1960); 282 F.2d 343 (C.A.4th Cir., 1960). NORFOLK: Beckett v. School Bd., 2 Race Rel. 337 (D.C.E.D.Va.1957); 148 F.Supp. 430 (D.C.E.D.Va.1957); 3 Race Rel. 942--964 (D.C.E.D.Va.1958); 260 F.2d 18 (C.A.4th Cir., 1958); 246 F.2d 325 (C.A.4th Cir., 1957); 181 F.Supp. 870 (D.C.E.D.Va.1959); 185 F.Supp. 459 (D.C.E.D.Va.1959); Farley v. Turner, 281 F.2d 131 (C.A.4th Cir., 1960); Hill v. School Bd., 282 F.2d 473 (C.A.4th Cir., 1960); James v. Duckworth, 170 F.Supp. 342 (D.C.E.D.Va.1959); 267 F.2d 224 (C.A.4th Cir., 1959); Adkinson v. School Bd. of Newport News, 3 Race Rel. 938 (D.C.E.D.Va.1958); Adkins v. School Bd. of Newport News, 148 F.Supp. 430 (D.C.E.D.Va.1957); 2 Race Rel. 334 (D.C.E.D.Va.1957); 246 F.2d 325 (C.A.4th Cir., 1957); Harrison v. Day, 200 Va. 439, 106 S.E.2d 636 (1959); James v. Almond, 170 F.Supp. 331 (D.C.E.D.Va.1959). PRINCE EDWARD COUNTY: Davis v. School Bd. of Prince Edward County, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873; 349 U.S. 294, 75 S.Ct.

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753, 99 L.Ed. 1083; 1 Race Rel. 82 (D.C.E.D.Va.1955); 142 F.Supp. 616 (D.C.E.D.Va.1956); 149 F.Supp. 431 (D.C.E.D.Va.1957); Allen v. County School Bd., 164 F.Supp. 786 (D.C.E.D.Va.1958); 249 F.2d 462 (C.A.4th Cir., 1957); 266 F.2d 507 (C.A.4th Cir., 1959); 6 Race Rel. 432 (D.C.E.D.Va.1961); 198 F.Supp. 497 (D.C.E.D.Va.1961); Southern School News, Aug. 1962, p. 1. PULASKI COUNTY: Crisp v. Pulaski County School Bd., 5 Race Rel. 721 (D.C.W.D.Va.1960). RICHMOND: Calloway v. Farley, 2 Race Rel. 1121 (D.C.E.D.Va.1957); Warden v. Richmond School Bd., 3 Race Rel. 971 (D.C.E.D.Va.1958). WARREN COUNTY: Kilby v. County School Bd., 3 Race Rel. 972--973 (D.C.W.D.Va.1958); County School Bd. v. Kilby, 259 F.2d 497 (C.A.4th Cir., 1958).

Despite this volume of litigation, only 1/2 of 1% of Virginia's Negro public school pupils attend school with whites. Southern School News, Sept. 1962, p. 3.

***437** It is apparent, therefore, that Chapter 33 as construed limits First Amendment freedoms. As this Court said in Thomas v. Collins, 323 U.S. 516, 537, 65 S.Ct. 315, 326, 89 L.Ed. 430, "Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts.' Thomas was convicted for delivering a speech in connection with an impending union election under National Labor Relations Board auspices, without having first registered as a 'labor organizer.' He urged workers to exercise their rights under the National Labor Relations Act and join the union he represented. This Court held that the registration requirement as applied to his activities was constitutionally invalid. In the instant case, members of the NAACP urged Negroes aggrieved by the allegedly unconstitutional segregation of public schools in Virginia to exercise their legal rights and to retain members of the Association's legal staff. Like Thomas, the Association and its members were advocating lawful means of vindicating legal rights.

[13] We hold that Chapter 33 as construed violates the Fourteenth Amendment by unduly inhibiting protected freedoms of expression and association. In so holding, we reject two further contentions of respondents. The first is that the Virginia Supreme Court of Appeals has guaranteed free expression by expressly confirming petitioner's right to continue its advocacy of civil-rights litigation. But in light of the whole decree of the court, the guarantee is of purely speculative value. As construed by the Court, Chapter 33, at least potentially, prohibits every ***438** cooperative activity that would make advocacy of litigation meaningful. If there is an internal tension between proscription and protection in the statute, we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights. Broad prophylactic rules in the area of free expression are suspect. See, e.g., Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357; Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231; Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293, 81 S.Ct. 1333, 6 L.Ed.2d 301. Cf. Schneider v. Town of Irvington, 308 U.S. 147, 162, 60 S.Ct. 146, 151, 84 L.Ed. 155. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.

C.

[14][15] The second contention is that Virginia has a subordinating interest in the regulation of the legal profession, embodied in Chapter 33, which justifies limiting petitioner's First Amendment rights. Specifically, Virginia contends that the NAACP's activities in furtherance of litigation, being 'improper solicitation' under the state statute, fall within the traditional purview of ****341** state regulation of professional conduct. However, the State's attempt to equate the activities of the NAACP and its lawyers with common-law barratry, maintenance and champerty, [FN17] and to outlaw them accordingly, cannot obscure the serious encroachment worked by Chapter 33 upon protected freedoms of expression. The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms. Thus it is no answer to the constitutional claims asserted by petitioner to say, as the Virginia Supreme Court of Appeals has said, that the ***439**

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purpose of these regulations was merely to insure high professional standards and not to curtail free expression. For a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights. See Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796; Konigsberg v. State Bar, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 810. Cf. In re Sawyer, 360 U.S. 622, 79 S.Ct. 1376, 3 L.Ed.2d 1473. In NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 461, 78 S.Ct. 1163, 1171, 2 L.Ed.2d 1488, we said, 'In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action.' Later, in Bates v. Little Rock, 361 U.S. 516, 524, 80 S.Ct. 412, 417, 4 L.Ed.2d 480, we said, '(w)here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.' Most recently, in Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293, 297, 81 S.Ct. 1333, 1336, 6 L.Ed.2d 301, we reaffirmed this principle: '* * * regulatory measures * * * no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights.'

FN17. See 4 Blackstone, Commentaries, 134--136. See generally Radin, Maintenance by Champerty, 24 Cal.L.Rev. 48 (1935).

[16] However valid may be Virginia's interest in regulating the traditionally illegal practices of barratry, maintenance and champerty, that interest does not justify the prohibition of the NAACP activities disclosed by this record. Malicious intent was of the essence of the common-law offenses of fomenting or stirring up litigation. [FN18] And whatever may be or may have been true of suits against ***440** government in other countries, the exercise in our own, as in this case, of First Amendment rights to enforce constitutional rights through litigation, as a matter of law, cannot be deemed malicious. Even more modern, subtler regulations of unprofessional conduct or interference with professional relations, not involving malice, would not touch the activities at bar; regulations which reflect hostility to stirring up litigation have been aimed chiefly at those who urge recourse to the courts for private gain, serving no public interest. [FN19] Hostility still exists to stirring ****342 *441** up private litigation where it promotes the use of legal machinery to oppress: as, for example, to sow discord in a family; [FN20] to expose infirmities in land titles, as by hunting up claims of adverse possession; [FN21] to harass large companies through a multiplicity of small claims; [FN22] or to oppress debtors as by seeking out unsatisfied judgments. [FN23] For a member of the bar to participate, directly or through intermediaries, in such misuses of the legal process is conduct traditionally condemned as injurious to the public. And beyond this, for a lawyer to attempt to reap gain by urging another to engage in private litigation has also been condemned: that seems to be the import of Canon 28, which the Virginia Supreme Court of Appeals has adopted as one of its Rules. [FN24]

FN18. See, e.g., Commonwealth v. McCulloch, 15 Mass. 227 (1818); Brown v. Beauchamp, 5 T.B.Mon. 413 (Ky.1827) ; Perkins, Criminal Law, 449--454 (1957); Note, 3 Race Rel. 1257--1259 (1958).
The earliest regulation of solicitation of legal business in England was aimed at the practice whereby holders of claims to land conveyed them to great feudal lords, who used their power or influence to harass the titleholders. See Winfield, The History of Conspiracy and Abuse of Legal Procedure, 152 (1921).

FN19. See Comment: A Critical Analysis of Rules Against Solicitation by Lawyers, 25 U. of Chi.L.Rev. 674 (1958). But truly nonpecuniary arrangements involving the solicitation of legal business have been frequently upheld. See In re Ades, 6 F.Supp. 467 (D.C.D.Md.1934) (lawyer's volunteering his services to a litigant, without being asked, held not unprofessional where 'important issues' were at stake); Gunnels v. Atlanta Bar Ass'n, 191 Ga. 366, 12 S.E.2d 602, 132 A.L.R. 1165 (1940) (arrangement whereby a local bar association publicly offered to represent, free of charge, persons victimized by usurers, upheld). Of

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particular pertinence to the instant case is Opinion 148, supra, note 13. In the 1930's, a National Lawyers Committee was formed under the auspices of the Liberty League. The Committee proposed (1) to prepare and disseminate through the public media of communications opinions on the constitutionality of state and federal legislation (it appears, particularly New Deal legislation); (2) to offer counsel, without fee or charge, to anyone financially unable to retain counsel who felt that such legislation was violating his constitutional rights. The ABA's Committee on Professional Ethics and Grievances upheld the arrangement. Opinion 148, Opinions of the Committee on Professional Ethics and Grievances, American Bar Association, 308--312 (1957); see Comment, 36 Col.L.Rev. 993. Also, for example, the American Civil Liberties Union has for many years furnished counsel in many cases in many different parts of the country, without governmental interference. Although this intervention is mostly in the form of amicus curiae briefs, occasionally counsel employed by the Union appears directly on behalf of the litigant. See Comment, Private Attorneys-General: Group Action in the Fight for Civil Liberties, 58 Yale L.J. 574, 576 (1949); ACLU Report on Civil Liberties 1951--1953, pp. 9--10.

FN20. See Encouraging Divorce Litigation as Ground for Disbarment or Suspension, 9 A.L.R. 1500 (1920); 'Heir-hunting' as Ground for Disciplinary Action Against Attorney, 171 A.L.R. 351, 352--355 (1947).

FN21. See Backus v. Byron, 4 Mich. 535, 551--552 (1857).

FN22. See Matter of Clark, 184 N.Y. 222, 77 N.E. 1 (1906); Gammons v. Johnson, 76 Minn. 76, 78 N.W. 1035 (1899).

FN23. See Petition of Hubbard, 267 S.W.2d 743 (Ky.Ct.App.1954).

FN24. See 171 Va., p. xxix, following the American Bar Association's Canons of Professional Ethics, No. 28: 'It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. * * * It is disreputable * * * to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes * * *.'

Objection to the intervention of a lay intermediary, who may control litigation or otherwise interfere with the rendering of legal services in a confidential relationship, also derives from the element of pecuniary gain. Fearful of dangers thought to arise from that element, the courts of several States have sustained regulations aimed ***442** at these activities. [FN25] ****343** We intimate no view one way or the other as to the merits of those decisions with respect to the particular arrangements against which they are directed. It is enough that the superficial resemblance in form between those arrangements and that at bar cannot obscure the vital fact that here the entire arrangement employs constitutionally privileged means of expression to secure constitutionally guaranteed civil rights. [FN26] There ***443** has been no showing of a serious danger here of professionally reprehensible conflicts of interest which rules against solicitation frequently seek to prevent. This is so partly because no monetary stakes are involved, and so there is no danger that the attorney will desert or subvert the paramount interests of his client to enrich himself or an outside sponsor. And the aims and interests of NAACP have not been shown to conflict with those of its members and nonmember Negro litigants; compare NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 459, 78 S.Ct. 1163, 1170, 2 L.Ed.2d 1488, where we said:

FN25. See People ex rel. Courtney v. Association of Real Estate Taxpayers, 354 Ill. 102, 187 N.E. 823 (1933) (Association to contest constitutionality of tax statutes in which parties and Association attorneys had large sums of money at stake); In the Matter of Maclub of America, Inc., 295

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Mass. 45, 3 N.E.2d 272, 105 A.L.R. 1360 (1936) (motorists' association recommended and paid the fees of lawyers to prosecute or defend claims on behalf of motorist members); see also People ex rel. Chicago Bar Ass'n v. Chicago Motor Club, 362 Ill. 50, 199 N.E. 1 (1935). One aspect of the lay intermediary problem which involved the absence of evidence of palpable control or interference was an arrangement adopted by the Brotherhood of Railroad Trainmen in 1930 under which union members having claims under the Federal Employers' Liability Act were induced to retain lawyers selected by the Brotherhood and to make 25% contingent fee agreements with such lawyers. The arrangement was struck down by several state courts. To the courts which condemned the arrangement it appeared in practical effect to confer a monopoly of FELA legal business upon lawyers chosen by the Brotherhood. These courts also saw it as tending to empower the Brotherhood to exclude lawyers from participation in a lucrative practice, and to cause the loyalties of the union-recommended lawyers to be divided between the union and their clients. E.g., Hildebrand v. State Bar, 36 Cal.2d 504, 225 P.2d 508 (1950); Doughty v. Grills, 37 Tenn.App. 63, 260 S.W.2d 379 (1952); In re Brotherhood of Railroad Trainmen, 13 Ill.2d 391, 150 N.E.2d 163 (1958); see Student Symposium, 107 U. of Pa.L.Rev. 387 (1959); 11 Stan.L.Rev. 394 (1959). These decisions have been vigorously criticized. See Traynor, J., dissenting in Hildebrand, supra; Drinker, Legal Ethics, 161--167 (1953).

FN26. Compare Opinion 148, supra, n. 13, 19, at 312 (1957): 'The question presented, with its implications, involves problems of political, social and economic character that have long since assumed the proportions of national issues, on one side or the other which multitudes of patriotic citizens have aligned themselves. These issues transcend the range of professional ethics.'

'(the NAACP) and its members are in every practical sense identical. The Association, which provides in its constitution that '(a)ny person who is in accordance with (its) principles and policies * * *' may become a member, is but the medium through which its individual members seek to make more effective the expression of their own views.' See also Harrison v. NAACP, 360 U.S. 167, 177, 79 S.Ct. 1025, 1030, 3 L.Ed.2d 1152.

Resort to the courts to seek vindication of constitutional rights is a different matter from the oppressive, malicious, or avaricious use of the legal process for purely private gain. Lawsuits attacking racial discrimination, at least in Virginia, are neither very profitable nor very popular. They are not an object of general competition among Virginia lawyers; [FN27] the problem is rather one of an apparent dearth of lawyers who are willing to undertake such litigation. There has been neither claim nor ***444** proof that any assisted Negro litigants have desired, but have been prevented from retaining, the services of other counsel. We realize that an NAACP lawyer must derive personal satisfaction from participation in litigation on behalf of Negro rights, else he would hardly be inclined to participate at the risk of financial sacrifice. But this would not seem to be the kind of interest or motive which induces criminal conduct.

FN27. Improper competition among lawyers is one of the important considerations relied upon to justify regulations against solicitation. See Note, Advertising, Solicitation and Legal Ethics, 7 Vand.L.Rev. 677, 684 (1954).

We conclude that although the petitioner has amply shown that its activities fall within the First Amendment's protections, ****344** the State has failed to advance any substantial regulatory interest, in the form of substantive evils flowing from petitioner's activities, which can justify the broad prohibitions which it has imposed. Nothing that this record shows as to the nature and purpose of NAACP activities permits an inference of any injurious intervention in or control of litigation which would constitutionally authorize the application of Chapter 33 to those activities. A fortiori, nothing in this record justifies the breadth and vagueness of the Virginia Supreme Court of

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Appeals' decree.

[17] A final observation is in order. Because our disposition is rested on the First Amendment as absorbed in the Fourteenth, we do not reach the considerations of race or racial discrimination which are the predicate of petitioner's challenge to the statute under the Equal Protection Clause. That the petitioner happens to be engaged in activities of expression and association on behalf of the rights of Negro children to equal opportunity is constitutionally irrelevant to the ground of our decision. The course of our decisions in the First Amendment area makes plain that its protections would apply as fully to those who would arouse our society against the objectives of the petitioner. See, e.g., Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357; Terminiello v. Chicago, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131; Kunz v. New York, 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280. For the Constitution protects expression ***445** and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered.

Reversed.

Mr. Justice DOUGLAS, concurring.

While I join the opinion of the Court, I add a few words. This Virginia Act is not applied across the board to all groups that use this method of obtaining and managing litigation, but instead reflects a legislative purpose to penalize the N.A.A.C.P. because it promotes desegregation of the races. Our decision in Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, holding that maintenance of public schools segregated by race violated the Equal Protection Clause of the Fourteenth Amendment, was announced May 17, 1954. The amendments to Virginia's code, here in issue, were enacted in 1956. Arkansas, Florida, Georgia, Mississippi, South Carolina, and Tennessee [FN*] also passed laws following our 1954 decision which brought within their barratry statutes attorneys paid by an organization such as the N.A.A.C.P. and representing litigants without charge.

FN* Ark.Stat.Ann.1947 (Cum.Supp.1961), ss 41--703 to 41--713; Fla.Stat.Ann.1944 (Cum.Supp.1962), ss 877,01, 877.02; Ga.Code Ann.1953 (Cum.Supp.1961), ss 26--4701, 26--4703; Miss.Code Ann.1956, ss 2049--01 to 2049--08; S.C.Code, 1952 (Cum.Supp.1960), ss 56--147 to 56--147.6; Tenn.Code Ann.1956 (Cum.Supp.1962), ss 39--3405 to 39--3410.

The bill, here involved, was one of five that Virginia enacted 'as parts of the general plan of massive resistance to the integration of schools of the state under the Supreme Court's decrees.' Those are the words of Judge Soper, writing for the court in N.A.A.C.P. v. Patty, D.C., 159 F.Supp. 503, 515. He did not indulge in guesswork. He ***446** reviewed the various steps taken by Virginia to resist our Brown decision, starting with the Report of the Gray Commission on November 11, 1955. Id., at 512. He mentioned the 'interposition resolution' passed by the General Assembly on February 1, 1956, the constitutional amendment made to carry out the recommendation of the Report of the Gray Commission, and the address of the Governor before the General Assembly that enacted the five laws, including the present one. Id., at 513--515. These are too lengthy to repeat here. But ****345** they make clear the purpose of the present law--as clear a purpose to evade our prior decisions as was the legislation in Lane v. Wilson, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281, another instance of a discriminatory state law. The fact that the contrivance used is subtle and indirect is not material to the question. 'The Amendment nullifies sophisticated as well as simple-minded modes of discrimination.' Id., at 275, 59 S.Ct. at 876. There we looked to the origins of the state law and the setting in which it operated to find its discriminatory nature. It is proper to do the same here.

Discrimination also appears on the face of this Act. The line drawn in s 54--78 is between an organization which has 'no pecuniary right or liability' in a judicial proceeding and one that does. As we said in N.A.A.C.P. v. Alabama ex rel. Patterson, 357 U.S. 449, 459, 78 S.Ct. 1163, 1170, 2 L.Ed.2d 1488, the N.A.A.C.P. and its members

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are 'in every practical sense identical. The Association * * * is but the medium through which its individual members seek to make more effective the expression of their own views.' Under the statute those who protect a 'pecuniary right or liability' against unconstitutional invasions may indulge in 'the solicitation * * * of business for (an) attorney,' while those who protect other civil rights may not. This distinction helps make clear the purpose of the legislation, which, as Judge Soper said, was part of the program of 'massive resistance' against Brown v. Board of Education, supra.

***447** Mr. Justice WHITE, concurring in part and dissenting in part.

I agree that as construed by the Virginia Supreme Court, Chapter 33 does not proscribe only the actual control of litigation after its commencement, that it does forbid, under threat of criminal punishment, advising the employment of particular attorneys, and that as so construed the statute is unconstitutional.

Nor may the statute be saved simply by saying it prohibits only the 'control' of litigation by a lay entity, for it seems to me that upon the record before us the finding of 'control' by the Virginia Supreme Court must rest to a great extent upon an inference from the exercise of those very rights which this Court or the Virginia Supreme Court, or both, hold to be constitutionally protected: advising Negroes of their constitutional rights, urging them to institute litigation of a particular kind, recommending particular lawyers and financing such litigation. Surely it is beyond the power of any State to prevent the exercise of constitutional rights in the name of preventing a lay entity from controlling litigation. Consequently, I concur in the judgment of the Court, but not in all of its opinion.

If we had before us, which we do not, a narrowly drawn statute proscribing only the actual day-to-day management and dictation of the tactics, strategy and conduct of litigation by a lay entity such as the NAACP, the issue would be considerably different, at least for me; for in my opinion neither the practice of law by such an organization nor its management of the litigation of its members or others is constitutionally protected. Both practices are well within the regulatory power of the State. In this regard I agree with my Brother HARLAN.

It is not at all clear to me, however, that the opinion of the majority would not also strike down such a narrowly ***448** drawn statute. To the extent that it would, I am in disagreement. Certainly the NAACP, as I understand its position before this Court, denied that it had managed or controlled the litigation which it had urged its members or others to bring, disclaimed and desire to do so and denied any adverse effects upon its operations if lawyers representing clients in school desegregation or other litigation financed by the NAACP represented only those clients and were under no obligation to follow the dictates of the NAACP ****346** in the conduct of that litigation. I would avoid deciding a case not before the Court.

Mr. Justice HARLAN, whom Mr. Justice CLARK and Mr. Justice STEWART join, dissenting.

No member of this Court would disagree that the validity of state action claimed to infringe rights assured by the Fourteenth Amendment is to be judged by the same basic constitutional standards whether or not racial problems are involved. No worse setback could befall the great principles established by Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, than to give fairminded persons reason to think otherwise. With all respect, I believe that the striking down of this Virginia statute cannot be squared with accepted constitutional doctrine in the domain of state regulatory power over the legal profession.

I.

At the outset the factual premises on which the Virginia Supreme Court of Appeals upheld the application of Chapter 33 to the activities of the NAACP in the area of litigation, as well as the scope of that court's holding, should be delineated.

First, the lawyers who participate in litigation sponsored by petitioner are, almost without exception, members of the legal staff of the NAACP Virginia State Conference. (It is, in fact, against Conference policy to ***449** give financial support to litigation not handled by a staff lawyer.) As such, they are selected by petitioner, are compensated by it for work in litigation (whether or not petitioner is

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83 S.Ct. 328
371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405
(Cite as: 371 U.S. 415, 83 S.Ct. 328)

a party thereto), and so long as they remain on the staff, are necessarily subject to its directions. As the Court recognizes, it is incumbent on staff members to agree to abide by NAACP policies.

Second, it is equally clear that the NAACP's directions, or those of its officers and divisions, to staff lawyers cover many subjects relating to the form and substance of litigation. Thus, in 1950, it was resolved at a Board of Directors meeting that:

> 'Pleadings in all educational cases--the prayer in the pleading and proof be aimed at obtaining education on a non-segregated basis and that no relief other than that will be acceptable as such.
> 'Further, that all lawyers operating under such rule will urge their client and the branches of the Association involved to insist on this final relief.'

The minutes of the meeting went on to state:

> 'Mr. Weber inquired if this meant that the branches would be prohibited from starting equal facility cases and the Special Counsel said it did.'

In 1955, a Southwide NAACP Conference issued directions to all NAACP branches outlining the procedure for obtaining desegregation of schools and indicating the point in the procedure at which litigation should be brought and the matter turned over to the 'Legal Department.' At approximately the same time, the Executive Secretary of the Virginia State Conference issued a directive urging that in view of the possibility of an extended court fight, 'discretion and care should be exercised to secure petitioners who will--if need be--go all the way.'

A report issued several years later, purporting to give an 'up to date picture' of action taken in Virginia by ***450** petitioner stated: 'Selection of suit sites reserved for legal staff'; 'State legal staff ready for action in selected areas'; and 'The majority of our branches are willing to support legal action or any other program leading to early desegregation of schools that may be suggested by the National and State Conference officers.'

In short, as these and other materials in the record show, the form of pleading, the type of relief to be requested, and ****347** the proper timing of suits have to a considerable extent, if not entirely, been determined by the Conference in coordination with the national office.

Third, contrary to the conclusion of the Federal District Court in the original federal proceeding, NAACP v. Patty, 159 F.Supp. 503, 508--509, the present record establishes that the petitioner does a great deal more than to advocate litigation and to wait for prospective litigants to come forward. In several instances, especially in litigation touching racial discrimination in public schools, specific directions were given as to the types of prospective plaintiffs to be sought, and staff lawyers brought blank forms to meetings for the purpose of obtaining signatures authorizing the prosecution of litigation in the name of the signer.

Fourth, there is substantial evidence indicating that the normal incidents of the attorney-client relationship were often absent in litigation handled by staff lawyers and financed by petitioner. Forms signed by prospective litigants have on occasion not contained the name of the attorney authorized to act. In many cases, whether or not the form contained specific authorization to that effect, additional counsel have been brought into the action by staff counsel. There were several litigants who testified that at no time did they have any personal dealings with the lawyers handling their cases nor were they aware until long after the event that suits had been filed in their names. This is not to suggest that the petitioner ***451** has been shown to have sought plaintiffs under false pretenses or by inaccurate statements. But there is no basis for concluding that these were isolated incidents, or that petitioner's methods of operation have been such as to render these happenings out of the ordinary.

On these factual premises, amply supported by the evidence, the Virginia Supreme Court of Appeals held that petitioner and those associated with it

> 'solicit prospective litigants to authorize the filing of suits by NAACP and Fund (Educational Defense Fund) lawyers, who are paid by the Conference and controlled by NAACP policies * * *' (202 Va., at 159, 116 S.E.2d at 68--69),

and concluded that this conduct violated Chapter 33 as well as Canons 35 and 47 of the Canons of Professional Ethics of the American Bar Association, which had been adopted by the Virginia courts more than 20 years ago.

At the same time the Virginia court demonstrated a

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responsible awareness of two important limitations on the State's power to regulate such conduct. The first of these is the long-standing recognition, incorporated in the Canons, of the different treatment to be accorded to those aiding the indigent in prosecuting or defending against legal proceedings. The second, which coupled with the first led the court to strike down Chapter 36 (p. 330), is the constitutional right of any person to express his views, to disseminate those views to others, and to advocate action designed to achieve lawful objectives, which in the present case are also constitutionally due. Mindful of these limitations, the state court construed Chapter 33 not to prohibit petitioner and those associated with it from acquainting colored persons with what it believes to be their rights, or from advising them to assert those rights in legal proceedings, but only from 'solicit(ing) legal business for their attorneys or any ***452** particular attorneys.' Further, the court determined that Chapter 33 did not preclude petitioner from contributing money to persons to assist them in prosecuting suits, if the suits 'have not been solicited by the appellants (the NAACP and Defense Fund) or those associated with them, and channeled by them to their attorneys or any other attorneys.'

In my opinion the litigation program of the NAACP, as shown by this record, falls within an area of activity which a State may constitutionally regulate. ****348** (Whether it was wise for Virginia to exercise that power in this instance is not, of course, for us to say.) The Court's contrary conclusion rests upon three basic lines of reasoning: (1) that in the context of the racial problem the NAACP's litigating activities are a form of political expression within the protection of the First Amendment, as extended to the States by the Fourteenth; (2) that no sufficiently compelling subordinating state interest has been shown to justify Virginia's particular regulation of these activities; and (3) that in any event Chapter 33 must fall because of vagueness, in that as construed by the state court the line between the permissible and impermissible under the statute is so uncertain as potentially to work a stifling of constitutionally protected rights. Each of these propositions will be considered in turn.

II.

Freedom of expression embraces more than the right of an individual to speak his mind. It includes also his right to advocate and his right to join with his fellows in an effort to make that advocacy effective. Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430; NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488; Bates v. Little Rock, 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480. And just as it includes the right jointly to petition the legislature for redress of grievances, see ***453**Eastern R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137-- 138, 81 S.Ct. 523, 529--530, 5 L.Ed.2d 464, so it must include the right to join together for purposes of obtaining judicial redress. We have passed the point where litigation is regarded as an evil that must be avoided if some accommodation short of a lawsuit can possibly be worked out. Litigation is often the desirable and orderly way of resolving disputes of broad public significance, and of obtaining vindication of fundamental rights. This is particularly so in the sensitive area of racial relationships.

But to declare that litigation is a form of conduct that may be associated with political expression does not resolve this case. Neither the First Amendment nor the Fourteenth constitutes an absolute bar to government regulation in the fields of free expression and association. This Court has repeatedly held that certain forms of speech are outside the scope of the protection of those Amendments, and that, in addition, 'general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise,' are permissible 'when they have been found justified by subordinating valid governmental interests.' [FN1] The problem in each such case is to weigh the legitimate interest of the State against the effect of the regulation on individual rights.

FN1. Konigsberg v. State Bar, 366 U.S. 36, 50--51, 81 S.Ct. 997, 1007, 6 L.Ed.2d 105; and see cases cited therein, including Cox v. New Hampshire, 312 U.S. 569, 61 S.Ct. 762, 82 L.Ed. 1049; Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031; Breard v. Alexandria, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233; Roth v. United States, 354 U.S. 476, 77

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S.Ct. 1304, 1 L.Ed.2d 1498; Bates v. Little Rock, 361 U.S. 516, 524, 80 S.Ct. 412, 417, 4 L.Ed.2d 480; Wilkinson v. United States, 365 U.S. 399, 81 S.Ct. 567, 5 L.Ed.2d 633.

An analogy may be drawn between the present case and the rights of workingmen in labor disputes. At the heart of these rights are those of a laborer or a labor representative to speak: to inform the public of his disputes and to urge his fellow workers to join together for mutual aid and protection. So important are these particular rights that absent a clear and present danger of the gravest evil, ***454** the State not only is without power to impose a blanket prohibition on their exercise, Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093, but also may not place any significant obstacle in their path, Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430.

But as we move away from speech alone and into the sphere of conduct-- ****349** even conduct associated with speech or resulting from it--the area of legitimate governmental interest expands. A regulation not directly suppressing speech or peaceable assembly, but having some impact on the form or manner of their exercise will be sustained if the regulation has a reasonable relationship to a proper governmental objective and does not unduly interfere with such individual rights. Thus, although the State may not prohibit all informational picketing, it may prevent mass picketing, Allen-Bradley Local, etc. v. Wisconsin Employment Relations Board, 315 U.S. 740, 62 S.Ct. 820, 86 L.Ed. 1154, and picketing for an unlawful objective, Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834. Although it may not prevent advocacy of union membership, it can to some degree inquire into and define the qualifications of those who solicit funds from prospective members or who hold other positions of responsibility. [FN2] A legislature may not wholly eliminate the right of collective action by workingmen, [FN3] but it may to a significant extent dictate the form their organization shall take [FN4] and may limit the demands that the organization may make on employers and others, see, e.g., International Brotherhood of Electrical Workers, etc. v. National Labor Relations Board, 341 U.S. 694, 705, 71 S.Ct. 954, 960, 95 L.Ed. 1299

FN2. See Thomas v. Collins, 323 U.S. 516, 544--545, 65 S.Ct. 315, 329, 89 L.Ed. 430 (concurring opinion); American Communications Ass'n v. Douds, 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925; De Veau v. Braisted, 363 U.S. 144, 80 S.Ct. 1146, 4 L.Ed.2d 1109.

FN3. See the discussion in Hague v. C.I.O., 307 U.S. 496, 518, 523--525, 59 S.Ct. 954, 965, 967--968, 83 L.Ed. 1423 (opinion of Mr. Justice Stone).

FN4. See, e.g., the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. (Supp. III) ss 401 et seq., 29 U.S.C.A. ss 401 et seq.

Turning to the present case, I think it evident that the basic rights in issue are those of the petitioner's members ***455** to associate, to discuss, and to advocate. Absent the gravest danger to the community, these rights must remain free from frontal attack or suppression, and the state court has recognized this in striking down Chapter 36 and in carefully limiting the impact of Chapter 33. But litigation, whether or not associated with the attempt to vindicate constitutional rights, is conduct; it is speech plus. Although the State surely may not broadly prohibit individuals with a common interest from joining together to petition a court for redress of their grievances, it is equally certain that the State may impose reasonable regulations limiting the permissible form of litigation and the manner of legal representation within its borders. Thus the State may, without violating protected rights, restrict those undertaking to represent others in legal proceedings to properly qualified practitioners. And it may determine that a corporation or association does not itself have standing to litigate the interests of its shareholders or members--that only individuals with a direct interest of their own may join to press their claims in its courts. Both kinds of regulation are undeniably matters of legitimate concern to the State and their possible impact on the rights of expression and association is far too remote to cause any doubt as to their validity.

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So here, the question is whether the particular regulation of conduct concerning litigation has a reasonable relation to the furtherance of a proper state interest, and whether that interest outweighs any foreseeable harm to the furtherance of protected freedoms.

III.

The interest which Virginia has here asserted is that of maintaining high professional standards among those who practice law within its borders. This Court has consistently recognized the broad range of judgments that a State may properly make in regulating any profession. ***456 ****350** See, e.g., Dent v. West Virginia, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623; Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 55 S.Ct. 570, 79 L.Ed. 1086; Williamson v. Lee Optical Co., 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563. But the regulation of professional standards for members of the bar comes to us with even deeper roots in history and policy, since courts for centuries have possessed disciplinary powers incident to the administration of justice. See Cohen v. Hurley, 366 U.S. 117, 123--124, 81 S.Ct. 954, 958, 6 L.Ed.2d 156; Konigsberg v. State Bar, 366 U.S. 36, 81 S.Ct. 997, 6 L.Ed.2d 105; Martin v. Walton, 368 U.S. 25, 82 S.Ct. 1, 7 L.Ed.2d 5.

The regulation before us has its origins in the long-standing common-law prohibitions of champerty, barratry, and maintenance, the closely related prohibitions in the Canons of Ethics against solicitation and intervention by a lay intermediary, and statutory provisions forbidding the unauthorized practice of law. [FN5] The Court ***457** recognizes this formidable history, but puts it aside in the present case on the grounds that there is here no element of malice or of pecuniary gain, that the interests of the NAACP are not to be regarded as substantially different from those of its members, and that we are said to be dealing here with a matter that transcends mere legal ethics--the securing of federally guaranteed rights. But these distinctions are too facile. They do not account for the full scope of the State's legitimate interest in regulating professional conduct. For although these professional standards may have been born in a desire to curb malice and self-aggrandizement by those who would use clients and the courts for their own pecuniary ends, they have acquired a far broader significance during their long development.

FN5. See 4 Blackstone, Commentaries, 134--136. Even apart from any state statutory provisions, state judiciaries normally consider themselves free, in the exercise of their supervisory authority over the bar, to enforce these prohibitions derived from the common law. See, e.g., In re Co-operative Law Co., 198 N.Y. 479, 92 N.E. 15, 32 L.R.A.,N.S., 55; People ex rel. Courtney v. Association of Real Estate Tax-payers, 354 Ill. 102, 187 N.E. 823; In re Maclub of America, Inc., 295 Mass. 45, 3 N.E.2d 272, 105 A.L.R. 1360, and cases cited therein. Many States, however, also have statutes dealing with these matters. Some merely incorporate the common-law proscriptions of barratry and maintenance. E.g., Del.Code Ann., 1953, Tit. 11, s 371; Mo.Stat.Ann., s 557.470 (Vernon, 1953). Several specifically prohibit the solicitation of legal business for a lawyer by an agent or 'runner.' E.g., Conn.Gen.Stat., 1958, s 51--87; N.C.Gen.Stat., s 84--38 (1958 Repl.Vol.); Wis.Stat.Ann., s 256.295(1). About 25 States prohibit the authorized practice of law by corporations. American Bar Foundation, Unauthorized Practice Statute Book (1961), 78--90.
Virginia's concern with these problems dates back to the beginning of the Commonwealth. Act of December 8, 1792, 1 Va.Stat. 110 (Shepherd, 1835). Sections 54--74 and 54--78, which as amended are before us today, were originally enacted in 1932, Va.Acts 1932, cc. 129, 284, and the Virginia Supreme Court of Appeals adopted the American Bar Association Canons of Ethics in haec verba in 1938. Virginia Canons of Professional Ethics, 171 Va. xviii--xxxv. As in many other States, the judiciary of Virginia has declared its inherent authority to assure proper ethical deportment. See, e.g., Richmond Ass'n of Credit Men, Inc. v. Bar Ass'n, 167 Va. 327, 335--336, 189 S.E. 153, 157.

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First, with regard to the claimed absence of the pecuniary element, it cannot well be suggested that the attorneys here are donating their services, since they are in fact compensated for their work. Nor can it tenably be argued that petitioner's litigating activities fall into the accepted category of aid to indigent litigants. [FN6] The reference is presumably to the fact that petitioner itself is a nonprofit organization not motivated by desire for financial gain but by public interest ****351** and to the fact that no monetary stakes are involved in the litigation.

> FN6. Virginia's policy of promoting aid to indigent suitors is of long standing, see 2 The Papers of Thomas Jefferson (Boyd ed. 1950), 628, and the decision of the state court in this case fully implements that policy.

But a State's felt need for regulation of professional conduct may reasonably extend beyond mere 'ambulance chasing.' In ***458**People ex rel. Courtney v. Association of Real Estate Tax-payers, 354 Ill. 102, 187 N.E. 823, a nonprofit corporation was held in contempt for engaging in the unauthorized practice of law. The Association was formed by citizens desiring to mount an attack on the constitutionality of certain tax rolls. Membership was solicited by the circulation of blank forms authorizing employment of counsel on the applicant's behalf and asking that property be listed for litigation. The attorneys were selected, paid, and controlled by the corporation, which made their services available to the taxpayer members at no cost. [FN7]

> FN7. The Court, p. 342, n. 25, deals with the Real Estate Taxpayers case simply by referring to it as one in which the 'parties and Association attorneys had large sums of money at stake.' It is true that the attorneys there (as here) were paid for their services by the Association although we are not told the amount of the payment to any attorney. It is also true that the constitutional rights which the members were there seeking to assert through the nonprofit Association were property rights, having monetary value. But I fail to see how these factors can be deemed to create an 'element of pecuniary gain' which distinguishes the Real Estate Tax-payers case from the present one in any significant respect.

Similarly, several decisions have condemned the provision of counsel for their members by nonprofit automobile clubs, even in instances involving challenges to the validity of a statute or ordinance. In re Maclub of America, Inc., 295 Mass. 45, 3 N.E.2d 272, 105 A.L.R. 1360; [FN8] People ex rel. Chicago Bar Ass'n v. Chicago Motor Club, 362 Ill. 50, 199 N.E. 1; see Opinion 8, Opinions of the Committee on Professional Ethics and Grievances, American Bar Assn.

> FN8. The activities of the Association in this Maclub case were more limited than those of the Association in the Real Estate Tax-payers case. The attorneys in Maclub were selected and retained directly by the members and bills were then submitted to and paid by the Association.

Of particular relevance here is a series of nationwide adjudications culminating in 1958 in ***459**In re Brotherhood of Railroad Trainmen, 13 Ill.2d 391, 150 N.E.2d 163. That was a proceeding, remarkably similar to the present one, for a declaratory judgment that the activities of the Brotherhood in assisting with the prosecution of it members' personal injury claims under the Federal Employers' Liability Act [FN9] were not inconsistent with a state law forbidding lay solicitation of legal business. The court found that each lodge of the Brotherhood appointed a member to file accident reports with the central office, and these reports were sent by the central office to a regional investigator, who, equipped with a contract form for the purpose, would urge the injured member to consult and employ one of the 16 regional attorneys retained by the Brotherhood. The regional counsel offered his services to the injured person on the basis of a contingent fee, the amount of which was fixed by the Brotherhood. The counsel themselves bore the costs of investigation and suit and of operating the Union's legal aid department.

> FN9. 35 Stat. 95 (1908), as amended, 45 U.S.C. ss 51--60, 45 U.S.C.A. ss 51--60.

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The Union argued that it was not motivated by any desire for profit; that it had an interest commensurate with that of its members in enforcement of the federal statute; and that the advantage taken of injured parties by unscrupulous claims adjustors made it essential to furnish economical recourse to dependable legal assistance. The court ruled against the Union on each of these points. It permitted the organization to maintain an investigative staff, to advise its members regarding their legal rights and to ****352** recommend particular attorneys, but it required the Union to stop fixing fees, to sever all financial connections with counsel, and to cease the distribution of contract forms.

The practices of the Brotherhood, similar in so many respects to those engaged in by the petitioner here, have ***460** been condemned by every state court which has considered them. Petition of Committee on Rule 28 of the Cleveland Bar Ass'n, 15 Ohio L.Abs. 106; In re O'Neill, 5 F.Supp. 465 (D.C.E.D.N.Y.); Hildebrand v. State Bar, 36 Cal.2d 504, 225 P.2d 508; Doughty v. Grills, 37 Tenn.App. 63, 260 S.W.2d 379; and see Atchison, T. & S.F.R. Co. v. Jackson, 235 F.2d 390, 393 (C.A.10th Cir.). And for similar opinions on related questions by bar association committees, see Opinion A, Opinions of the Committee on Unauthorized Practice of the Law, American Bar Assn., 36 A.B.A.J. 677; Opinion 773, Committee on Professional Ethics, Assn. of the Bar of the City of New York.

Underlying this impressive array of relevant precedent is the widely shared conviction that avoidance of improper pecuniary gain is not the only relevant factor in determining standards of professional conduct. Running perhaps even deeper is the desire of the profession, of courts, and of legislatures to prevent any interference with the uniquely personal relationship between lawyer and client and to maintain untrammeled by outside influences the responsibility which the lawyer owes to the courts he serves.

When an attorney is employed by an association or corporation to represent individual litigants, two problems arise, whether or not the association is organized for profit and no matter how unimpeachable its motives. The lawyer becomes subject to the control of a body that is not itself a litigant and that, unlike the lawyers it employs, is not subject to strict professional discipline as an officer of the court. In addition, the lawyer necessarily finds himself with a divided allegiance--to his employer and to his client-- which may prevent full compliance with his basic professional obligations. The matter was well stated, in a different but related context, by the New ***461** York Court of Appeals in In re Co-operative Law Co., 198 N.Y. 479, 483--484, 92 N.E. 15, 16, 32 L.R.A.,N.S., 55:

> 'The relation of attorney and client is that of master and servant in a limited and dignified sense, and it involves the highest trust and confidence. It cannot be delegated without consent, and it cannot exist between an attorney employed by a corporation to practice law for it, and a client of the corporation, for he would be subject to the directions of the corporation, and not to the directions of the client.'

There has, to be sure, been professional criticism of certain applications of these policies. [FN10] But the continued vitality of the principles involved is beyond dispute, [FN11] and at this writing it is hazardous at best to predict the direction of the future. For us, however, any such debate is without relevance, since it raises questions of social policy which have not been delegated to this Court for decision. Our responsibility is simply to determine the extent of the State's legitimate interest and to decide whether the course adopted bears a sufficient relation to that interest to fall within the bounds set by the Constitution.

> FN10. See, e.g., Weihofen, 'Practice of Law' by Non-Pecuniary Corporations: A Social Utility, 2 U. of Chi.L.Rev. 119; Drinker, Legal Ethics, 161--167; Traynor, J., dissenting in Hildebrand v. State Bar, supra.

> FN11. In addition to the decisions discussed in the text, further evidence of the attitude of the bench and bar is found in a survey described in McCracken, Report on Observance by the Bar of Stated Professional Standards, 37 Va.L.Rev. 399, 400--401 (1951).

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****353** Second, it is claimed that the interests of petitioner and its members are sufficiently identical to eliminate any 'serious danger' of 'professionally reprehensible conflicts of interest.' 371 U.S., p. 443, 83 S.Ct., p. 343. Support for this claim is sought in our procedural holding in ***462**NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 458--459, 78 S.Ct. 1163, 1169--1170, 2 L.Ed.2d 1488. But from recognizing, as in that case, that the NAACP has standing to assert the rights of its members when it is a real party in interest, it is plainly too large a jump to conclude that whenever individuals are engaged in litigation involving claims that the organization promotes, there cannot be any significant difference between the interests of the individual and those of the group.

The NAACP may be no more than the sum of the efforts and views infused in it by its members; but the totality of the separate interests of the members and others whose causes the petitioner champions, even in the field of race relations, may far exceed in scope and variety that body's views of policy, as embodied in litigating strategy and tactics. Thus it may be in the interest of the Association in every case to make a frontal attack on segregation, to press for an immediate breaking down of racial barriers, and to sacrifice minor points that may win a given case for the major points that may win other cases too. But in a particular litigation, it is not impossible that after authorizing action in his behalf, a Negro parent, concerned that a continued frontal attack could result in schools closed for years, might prefer to wait with his fellows a longer time for good-faith efforts by the local school board than is permitted by the centrally determined policy of the NAACP. Or he might see a greater prospect of success through discussions with local school authorities than through the litigation deemed necessary by the Association. The parent, of course, is free to withdraw his authorization, but is his lawyer, retained and paid by petitioner and subject to its directions on matters of policy, able to advise the parent with that undivided allegiance that is the hallmark of the attorney-client relation? I am afraid not.

Indeed, the potential conflict in the present situation is perhaps greater than those in the union, automobile club, and some of the other cases discussed above, pp. 350--352. ***463** For here, the interests of the NAACP go well beyond the providing of competent counsel for the prosecution or defense of individual claims; they embrace broadly fixed substantive policies that may well often deviate from the immediate, or even long-range, desires of those who choose to accept its offers of legal representations. This serves to underscore the close interdependence between the State's condemnation of solicitation and its prohibition of the unauthorized practice of law by a lay organization.

Third, it is said that the practices involved here must stand on a different footing because the litigation that petitioner supports concerns the vindication of constitutionally guaranteed rights. [FN12]

> FN12. It is interesting to note the Court's reliance on Opinion 148, Opinions of the Committee on Professional Ethics and Grievances, American Bar Assn. This opinion, issued in 1935 at the height of the resentment in certain quarters against the New Deal, approved the practice of the National Lawyers Committee of the Liberty League in publicly offering free legal services (without compensation from any source) to anyone who was unable to afford to challenge the constitutionality of legislation which he believed was violating his rights. The opinion may well be debatable as a matter of interpretation of the Canons. But in any event I think it wholly untenable to suggest (as the Court does in its holding today) that a contrary opinion regarding paid legal services to nonindigent litigants would be unconstitutional.

****354** But surely state law is still the source of basic regulation of the legal profession, whether an attorney is pressing a federal or a state claim within its borders. See In re Brotherhood of Railroad Trainmen, supra. The true question is whether the State has taken action which unreasonably obstructs the assertion of federal rights. Here, it cannot be said that the underlying state policy is inevitably inconsistent with federal interests. The State has sought to prohibit the solicitation and sponsoring of litigation by those who have no standing to initiate

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that litigation themselves and who are not simply coming to the *464 assistance of indigent litigants. Thus the state policy is not unrelated to the federal rules of standing--the insistence that federal court litigants be confined to those who can demonstrate a pressing personal need for relief. See McCabe v. Atchison, T. & S.F.R. Co., 235 U.S. 151, 162, 35 S.Ct. 69, 71, 59 L.Ed. 169; Massachusetts v. Mellon, 262 U.S. 447, 488, 43 S.Ct. 597, 601, 67 L.Ed. 1078; cf. Stark v. Wickard, 321 U.S. 288, 304--305, 64 S.Ct. 559, 568, 88 L.Ed. 733, and cases cited therein. This is a requirement of substance as well as form. It recognizes that, although litigation is not something to be avoided at all costs, it should not be resorted to in undue haste, without any effort at extrajudicial resolution, and that those lacking immediate private need may make unnecessary broad attacks based on inadequate records. Nor is the federal interest in impeding precipitate resort to litigation diminished when that litigation concerns constitutional issues; if anything, it is intensified. United Public Workers v. Mitchell, 330 U.S. 75, 86--91, 67 S.Ct. 556, 562--565, 91 L.Ed. 754.

There remains to be considered on this branch of the argument the question whether this particular exercise of state regulatory power bears a sufficient relation to the established and substantial interest of the State to overcome whatever indirect impact this statute may have on rights of free expression and association.

Chapter 33 as construed does no more than prohibit petitioner and those associated with it from soliciting legal business for its staff attorneys or, under a fair reading of the state court's opinion and amounting to the same thing, for 'outside' attorneys who are subject to the Association's control in the handling of litigation which it refers to them. See pp. 355--356, infra. Such prohibitions bear a strong and direct relation to the area of legitimate state concern. In matters of policy, involving the form, timing, and substance of litigation, such attorneys are subject to the directions of petitioner and not of those nominally their clients. Further, the methods used to obtain litigants are not conducive to encouraging the kind of attorney-*465 client relationships which the State reasonably may demand. There inheres in these arrangements, then, the potentialities of divided allegiance and diluted responsibility which the State may properly undertake to prevent.

The impact of such a prohibition on the rights of petitioner and its members to free expression and association cannot well be deemed so great as to require that it be struck down in the face of this substantial state interest. The important function of organizations like petitioner in vindicating constitutional rights is not of course to be minimized, but that function is not, in my opinion, substantially impaired by this statute. Of cardinal importance, this regulatory enactment as construed does not in any way suppress essembly, or advocacy of litigation in general or in particular. Moreover, contrary to the majority's suggestion, it does not, in my view, prevent petitioner from recommending the services of attorneys who are not subject to its directions and control. See pp. 352--356, infra. And since petitioner may contribute to those who need assistance, the prohibition should not significantly discourage anyone with sufficient interest **355 from pressing his claims in litigation or from joining with others similarly situated to press those claims. It prevents only the solicitation of business for attorneys subject to petitioner's control, and as so limited, should be sustained.

IV.

The Court's remaining line of reasoning is that Chapter 33 as construed (hereafter sometimes simply 'the statute') must be struck down on the score of vagueness and ambiguity. I think that this 'vagueness' concept has no proper place in this case and only serves to obsure rather than illuminate the true questions presented.

The Court's finding of ambiguity rests on the premise that the statute may prohibit mere recommendation of 'any particular attorney,' whether or not a member of *466 the NAACP's legal staff or otherwise subject to the Association's direction and control. Proceeding from this premise the Court ends by invalidating the entire statute on the basis that this alleged vagueness too readily lends itself to the stifling of protected activity.

The cardinal difficulty with this argument is that there simply is no real uncertainty in the statute, as the state court found, 202 Va., at 154, 116 S.E.2d,

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